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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1855

ALPHONSE SISCA, WILLIE ABRAHAM, WALTER GRANT, MARGARET LOGAN, ROBERT HOKE and ERROLL HOLDER,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Questions Presented for Review 3

Statement of the Case 4

1. The Alleged Conspiracy 5

   A. The Convent Avenue Raid 5

   B. The Olmstead Avenue Raid 9

2. The Wiretaps 12

   A. The Sequence of Events and Authorizations 12

   B. The Pre-trial Procedures and Motions to Suppress 13

   C. The Execution of the Warrants 16

   D. The Decision of the District Court on the Issue of "Minimization" 18

   E. The Decision of the Court of Appeals 19

Reasons for Granting the Writ 19

Introduction 19

I.—The Court of Appeals Erred as a Matter of Law and Fact in Finding a Waiver of the Petitioners' right to contest, pursuant to Title 18 U.S.C. Sections 2518 and 3504 and the Fourth Amendment of the Constitution of the United States, the Admissibility of Forty-two Electronically intercepted telephone calls 21

PAGE

II.—Did the Court of Appeals err in declining to pass upon the District Court's finding that (a) the minimization provisions of Title 18 U.S.C. 2518(5) had not been met and (b) that the appropriate remedy for lack of compliance was not suppression of the electronic surveillance and all leads derived therefrom 29

III.—21 U.S.C. § 848 Is Unconstitutional On Its Face In That It Is Vague And Indefinite 36

IV.—The Petitioner Sisca proved by substantial evidence that he had not used the telephone in furtherance of a conspiracy to violate the narcotics laws and the jury so acquitted him of that count. Did the Court of Appeals—despite the petitioner's substantial evidence of innocence on the telephone count—violate the Petitioner's right to due process of law by assuming that he in fact did use the telephone so as to sustain his participation in the conspiracy as charged in the indictment 41

CONCLUSION 51

TABLE OF CASES

Barker v. *Wingo*, 92 S. Ct. 2182 (1972) 27

Berger v. *New York*, 388 U.S. 41 (1967) 30, 31

Bouie v. *City of Columbia*, 378 U.S. 347 (1964) 37

Coates v. *Cincinnati*, 402 U.S. 611 (1971) 37

Connolly v. *General Construction Co.*, 269 U.S. 384 (1923) 36

Desist v. *United States*, 394 U.S. 244, 246 (1969) 28

PAGE

Fay v. *Noia*, 372 U.S. 391, 438-39 (1963) 27

Gelbard v. *United States*, 408 U.S. 41 28

Giordano v. *United States*, — U.S. — 15 Cr. L. Reporter 3033, 3039 fn. 13 3

Henry v. *Mississippi*, 379 U.S. 443, 450-451 (1965) 27

Interstate Circuit, Inc. v. *Dallas*, 390 U.S. 679, 88 S. Ct. 1298 (1968) 38

Johnson v. *Zerbst*, 304 U.S. 458 464 27

Jordan v. *De George*, 341 U.S. 23 (1951) 40

Katz v. *United States*, 389 U.S. 347 (1967) 30, 31

Kaufman v. *United States*, 394 U.S. 217, 227 n. 8 (1970) 27

Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 38

NAACP v. *Bulton*, 371 U.S. 415 (1963) 38

Papachristou v. *City of Jacksonville*, 92 S. Ct. 839 (1972) 37

People v. *Castania*, 73 Misc. 2d 166 33

People v. *Holder*, 69 Misc. 2d 863 33

People v. *Holder*, — Misc. — 2d — (Cty. Ct. West. Cty) 33

People v. *Kahan*, 15 N.Y. 2d 311 38

Ricks v. *District of Columbia*, 414 F.2d 1097 (D.C. Cir., 1968) 37

United States v. *Bennett*, 409 F.2d 888 (C.A. 2, 1969) 27

United States v. *Blackwood*, 456 F.2d (C.A. 2), *cert. denied*, 409 U.S. 863 (1972) 27

United States v. *Bynum*, 475 F.2d 832 (2d Cir. 1973) 26, 28

PAGE

United States v. *Cohen Grocrey Co.*, 255 U.S. 81 (1921) 37

United States v. *Collier*, 358 F. Supp. 1351 (E.D. Mich. 1973) 39

United States v. *Cox*, 462 F.2d 1293 (8th Cir. 1972) 20

United States v. *Ellis*, 461 F.2d 962 (C.A. 2), *cert. denied*, 409 U.S. 866 (1972) 27

United States v. *Focarile*, 340 F. Supp. 1033 D. Md.) *aff'd on other grounds sub nom United States* v. *Giordano*, 469 F.2d 522 (4th Cir., 1972, *cert. granted*, 411 U.S. 905 (1973), *aff'd on other grounds*, — U.S. —, 15 Cr. L. 3033 ..... 20, 34

United States v. *George*, 465 F.2d 772 (C.A. 6, 1972) 28

United States v. *Gelbard*, 408 U.S. 41 (1973) 36

United States v. *Glasser*, 315 U.S. 60, 62 Sup. Ct. 457 (1942) 42

United States v. *Harriss*, 347 U.S. 612 (1954) 38

United States v. *King*, 335 F. Supp. 523 (S.D. Cal., 1971) 20, 33

United States v. *Manfredi*, 488 F.2d 601 (2d Cir. 1973), *cert. denied sub nom. LaCosa* v. *United States*, — U.S. — (6/3/74) 39

United States v. *Manton*, C.A. 2, 1938, 107 F.2d 834 42

United States v. *Molso*, 443 F.2d 463 (2d Cir.), *cert. denied*, 404 U.S. 983 (1971) 39

United States v. *Nicholas*, 319 F.2d (C.A. 2), *cert. denied*, 375 U.S. 933 (1963) 27

United States v. *Rayen*, 314 U.S. 513 (1942) 38

United States v. *Reese*, 92 U.S. 214, 221, 23 L. Ed. 563 37

United States v. *Schneider*, 106 F. Supp. 906, D.C. Cal. 1952 50

PAGE

United States v. *Scott*, 331 F. Supp. 233 (S.D.D.C., 1971) 20, 28, 32, 33

United States v. *Spector*, 393 U.S. 169 (1952) 38

United States v. *Tortorello*, 480 F.2d 764 (2d Cir. 1973) 28, 31

United States v. *Toscanino*, — 2d — (C.A. 1974 slip opin. 23

United States v. *Volkell*, 251 F.2d 333 (C.A. 2), *cert. denied*, 356 U.S. 962 (1958) 27

United States v. *Vuitch*, 402 U.S. 62 37

United States v. *Weldon*, 384 F.2d 772 (C.A. 2, 1967) 27

Winters v. *New York*, 333 U.S. 507 (1948) 38

Statutes:

18 U.S.C. Section 2511 2

18 U.S.C. Section 2515 30

18 U.S.C. Section 2516 3

18 U.S.C. Section 2518 ..... 3, 21, 28

18 U.S.C. Section 2518(10)(a)(i)) 34

18 U.S.C. Section 2518(10)(b) 21, 25

18 U.S.C. Section 2518(5) 3, 16, 19

18 U.S.C. Section 2518(10)(a)(iii) 30

18 U.S.C. Section 2520 2

18 U.S.C. Section 3504 3

21 U.S.C. Section 843(b3 5

21 U.S.C. Section 846 5

21 U.S.C. Section 848 ..... 2, 4, 5

28 U.S.C. Section 1254(1) 2

PAGE

Other Authorities:

Fourth Amendment 2

Fifth Amendment 2

Rule 16(a)(2) and 16(b) of the Federal Rules of Criminal Procedure 13-14

Article 700 of the Criminal Procedure Law of New York 13

Section 700.30 of the New York Criminal Procedure Law 16

Application Procedures of Title III of the Omnibus Crime Control Act (18 U.S.C. 2516(1)) 34

Congress Enacted Title III of the Omnibus Crime Control Bill of 1968 31

III U.S. Cong. & Admin. News 1970, pp. 4648-4652 (Reproduced as Appendix "E-1") 38

N.Y. Penal Law, Book 39, §§ 220.00 *et seq.* 40

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Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Alphonse Sisca, Willie Abraham, Walter Grant, Margaret Logan, Robert Hoke and Erroll Holder pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on May 10, 1974 which affirmed judgments of conviction previously entered against each of the petitioners in the United States District Court for the Southern District of New York on June 16, 1973.

Opinions Below

Following the entry of the judgments in the District Court, the Petitioners appealed to the Court of Appeals.

The as yet unreported opinion of the Court of Appeals is set forth in Appendix A (1a)[1].

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

Constitutional and Statutory Provisions Involved

(1) This case involves the search and seizure provisions of the Fourth Amendment and the due process clause of the Fifth Amendment to the United States Constitution.

(2) This case also involves 18 United States Code, sections 2511-2520 (interception of wire or oral communications).

(3) 21 United States Code, section 848 (continuing criminal enterprise relating to narcotics).

These constitutional provisions and statutes are set forth in full in Petitioners' Appendices C through E.

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[1] The following abbreviations are used in the Petition:

"a"—is a reference to the Petitioners' Appendix which is separately bound and filed with this Petition. The Appendix contains the opinion of the Court of Appeals (Appendix A); the opinion of the District Court on the issue of "minimization" (Appendix B); the Electronic Surveillance provisions of Title 18 United States Code, Sections 2511-2520 (Appendix C); the provisions of Title 21, Section 848 (Appendix D) and the applicable provisions of the United States Constitution (Appendix E).

"R" is a reference to the two volume appendix submitted to the Circuit Court of Appeals which contains *inter alia*, the pre-trial proceedings and post-trial hearings. These volumes will be certified to this Court.

"T" is a reference to the approximately 4000 pages of trial testimony and exhibits, four copies of which were furnished to the Court of Appeals. These volumes will be certified to this Court.

Questions Presented for Review

During the period from September 28, 1971 through and including December 15, 1971, a joint Federal-State Task Force, pursuant to the provisions of Title 18 U.S.C. sections 2516-2518 and Article 700 of the Criminal Procedure Law of the State of New York, sought, obtained and executed six State Court orders and four extension orders which authorized the wiretapping of six telephones utilized by various petitioners and over which other petitioners voices were heard (R. 41). The number of hours of recorded conversations exceeded 700 and the number of conversations overheard, recorded and logged exceeded 3500. The following questions were passed upon, or declined to be passed upon, by the Court of Appeals and are presented on behalf of all petitioners for review by this Court.

1. Did the Court of Appeals err as a matter of law and fact in finding that on the facts of this case, that petitioners waived their rights to contest, pursuant to Title 18 U.S.C. sections 2518 and 3504 and the Fourth Amendment to the Constitution of the United States, the admissibility of 42 electronically intercepted telephone calls.

2. Did the Court of Appeals err in declining to pass upon the District Court's Finding that (a) the minimization provisions of Title 18 U.S.C. 2518(5) had *not been* met and (b), that the appropriate remedy for lack of compliance was not suppression of the electronic surveillance and all leads derived therefrom? [2]

The following additional question is presented on behalf of the Petitioner Abraham.

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[2] As noted in the opinions of the Court of Appeals and the District Court (19a-51a) the Federal Courts are presently divided on this question—an issue specifically left open in *Giordano* v. *United States*, — U.S. —, 15 Cr. L. Reporter 3033, 3039 fn. 13.

3. Is 21 U.S.C. section 848 unconstitutional on its face in that it is vague and indefinite?

The following additional question is presented on behalf of the Petitioner Sisca.

4. The Petitioner Sisca proved by substantial evidence that he had not used the telephone in furtherance of a conspiracy to violate the narcotics laws and the jury so acquitted him of that count. Did the Court of Appeals—despite the petitioner's substantial evidence of innocence on the telephone count—violate the Petitioner's right to due process of law by assuming that he in fact did use the telephone so as to sustain his participation in the conspiracy as charged in the indictment?

Statement of the Case[3]

On October 16, 1972, a sealed indictment was filed in the Southern District of New York. It charged the petitioners and twelve others with conspiracy to violate the federal narcotics laws (count one) and with using the telephone in furtherance of that conspiracy (count three). In addition, count two charged the Petitioner Abraham with engaging in a continuing criminal enterprise as manager, organizer and supervisor in violation of 21 U.S.C. 848 (R. 17-22).

On October 30, 1973, after the indictment had been unsealed, the Petitioners were arraigned and each pleaded not guilty.[4]

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[3] A key to the abbreviations used in this Petition is set forth in footnote 1, *supra*, at p. 2.

[4] At the time of trial, the defendants Castalazzo, Sizemore and Owens were fugitives. The defendant Dingle was severed for psychiatric reasons. During the course of the trial the District Court directed a verdict of acquittal as to the defendants Johnson, Hartley, Bazemore and Sullivan (R. 9, 11, 13). Upon information and belief, the defendants Brown, Ellington and McBride and Carol Holder have not petitioned this Court for relief.

Following a lengthy jury trial, judgments of conviction were entered against the Petitioners in the United States District Court for the Southern District of New York, convicting each of them of conspiracy to possess with intent to distribute narcotics in violation of Title 21 U.S.C. section 846. The Petitioners Abraham, Grant, Logan, and Holder were additionally convicted of using the telephone in facilitating the conspiracy in violation of Title 21 U.S.C. section 843(b). The Petitioner Abraham was also convicted of having organized, supervised and managed a continuing series of narcotics violations in concert with at least five other persons in violation of 21 U.S.C. 848. Each of the petitioners received substantial prison sentences.[5]

1. The Alleged Conspiracy

The prosecution's evidence given entirely by federal and local law enforcement officials assigned to the New York Joint Task Force (hereafter "Task Force"), and based on electronic surveillance was calculated to prove the existence of an 18 month conspiracy among the defendants to purchase and distribute narcotics. The scenario consisted of three acts which the prosecution sought to connect by a series of forty-two electronically intercepted phone calls distilled from over 700 hours of wiretapping.

The substance of the Government's case is set forth in the opinion of the Court of Appeals (3a-10a), and we shall repeat only so much of it here as is necessary to place the electronic surveillance within a factual context.

A. The Convent Avenue Raid

On November 24, 1971, several score agents assigned to the "task force", raided apartment 7 at 294 Convent in

[5] The sentences imposed upon the various petitioners ranged from five years to life imprisonment. The specific sentences imposed are set forth in footnote 1 of the Opinion of the Court of Appeals (3a).

Manhattan. The raid resulted in the arrest of six females, the seizure of a quantity of heroin and paraphernalia necessary for the conduct of a so-called "heroin mill". At trial, the prosecution urged that the mill operation was the culmination of events which commenced approximately six weeks prior to the raid. The factual narrative of that raid thus begins with the first week of October, 1971.

On October 5 and 6, Carol Holder telephoned Cleo Dingle, a girl named Lucy, and one Consuela Lopez with respect to having a meeting apparently, at the home of Miss Dingle's mother (GX 1; R. 271-73).[6] On October 6, 1971, the Petitioner Erroll Holder[7] and Ellington conversed with respect to the fact that "nothing was happening". Nevertheless, Holder reminded Ellington to go by the "convent" (GX 1; R. 275). Following his telephone call with Ellington, Holder telephoned the petitioner Abraham and informed him that he was bringing over the "thing".[8] On October 7, 1971, Lopez called Carol Holder requesting that she and her fellow mill girls be paid. Carol, after talking with her husband, apparently arranged for either Lopez or Dingle to pick up the money.

At approximately 9:30 a.m. on October 20, 1971, Holder telephoned Cleo Dingle to arrange for a meeting at 11:30 that night. Aware of Holder's conversation, members of the "task force" observed Holder enter the Brogham Supper Club located at 140th Street and Broadway (T. 1828).

At approximately 11:30 p.m., Holder, after ordering a drink, went to a telephone booth toward the rear of the

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[6] The prefix GX refers to Government Exhibits while the prefix DX refers to Defendants Exhibits.

[7] Unless otherwise indicated reference herein is to Petitioner Erroll Holder. When we refer to his wife, Carol, we shall so state.

[8] The government offered no expert testimony with respect to the meaning of certain words such as "thing". Nevertheless, for purposes of this statement petitioners assume it to mean money and/or heroin depending on context in which it is used.

bar. During his telephone call, three black females entered. Holder finished his telephone call and then engaged the females in conversation.

Three days later, on October 23, Carol Holder asked Cleo Dingle, to make herself available for a telephone call by her husband (R. 280-82). Despite these telephone calls, nothing transpired. This was confirmed in a telephone call between the defendant Ellington and Carol Holder in which the former related that he had received a call from J. C. (an alias allegedly utilized by the Petitioner Abraham) and that "nothing was happening" (R. 283).

On November 6, 1971, Carol Holder again called the Christian sisters and arranged for a meeting later that night. Two days later, at approximately 2:30 p.m., Abraham informed Holder that he had good news and that they should be in touch again that night. Ten minutes later, Holder informed Ellington of his conversation with Abraham. That evening, at approximately 7:40, Holder and Ellington had another conversation about their scheduled meet with Abraham (GX 1; R. 288-290). At 9:45, Abraham again called Holder to inform him that he was ready to meet but that he did not get as much contraband as expected. Abraham requested that Holder send "that boy" to pick up what he had. Holder then called Ellington and instructed him on how to handle the apparent pickup (GX 1; R. 293-95).

The next afternoon, Ellington informed Holder that all went well the night before and arrangements were made to meet the following day (GX 1; R. 296-98). On November 9, 1971, at approximately 3:40 p.m., Holder received a telephone call from one Bobby Nugent and another described only as "Crip". During the course of the conversation, Crip and Nugent, complained to Holder that they were apparently shorted in weight and Holder agreed to make good (GX 1; R. 299-301).

On November 11, 1971, Holder called Ellington to remind the latter to "pay the rent" and to arrange for a meeting with Abraham later that day. On cue, at about 2:30 p.m., Holder, in a green Buick, approached the residence of Petitioner Logan at 100-20 Benchley Place in the Bronx. After parking his vehicle, he removed a dark portfolio from the front seat and a package from the trunk of his car and proceeded into the building (T. 1736-37).

At approximately 9:45 p.m., on November 23, 1971, Consuela Lopez left her apartment at 1122 Taylor Avenue and proceeded by taxi to the Oasis Bar located at 148 Street and Broadway. Simultaneously, a green Buick driven by Carol Holder proceeded south on Broadway to a Chinese Restaurant located on 145th Street (R. 1479-80). At 145th Street, a female passenger exited the Buick which then made a "u-turn" and proceeded north on Broadway (R. 1480). The car then stopped at the Oasis, picked up Lopez, and proceeded to 150th Street between Amsterdam and Broadway where two additional females entered the car. The Buick then proceeded to Convent at 142nd Street where four females exited the car and entered 294 Convent Avenue (1481). The surveilling agents then began a floor by floor search to ascertain which apartment the four females had entered. While listening at the door of apartment "7", the detectives overheard conversation and "rubber bands popping". A search warrant was obtained and in the early morning hours of November 24, 1971, approximately ten agents raided the apartment.

During the course of that raid six women engaged in a "mill operation" were arrested and quantities of white powder, glassine envelopes, and other paraphernalia used to dilute narcotics were seized (T. 34-36, 233-234, 249-50, 258, 266, 1933-36, 1497-1500).

B. The Olmstead Avenue Raid

On November 8, 1971, members of the "task force" applied for and obtained an electronic intercept order for the telephone of Petitioner Logan. Based upon information overheard on the Logan tap, and surveillance conducted pursuant thereto, members of the "task force" on December 15, 1971, raided the home of the Petitioner Hoke at 461 Olmstead Avenue in the Bronx. Simultaneously with the raid, the Petitioners Logan, Grant, Abraham and Hoke were arrested and large quantities of alleged heroin and U.S. currency were seized. The events leading to this raid however had begun in early November.

On November 11, at 9:30 p.m., the Petitioner Grant telephoned Abraham for some "help." Abraham responded that nothing would happen until the following evening. Nevertheless, the two agreed to meet the following morning. On cue, at 10:00 a.m., members of the task force observed Grant leaving the Logan residence at 100-20 Benchley Place in the Bronx, carrying a green portfolio.

At 7:00 a.m. on November 13, Grant again telephonically communicated with Abraham and was told that nothing had changed. The following day, Grant again was informed that all was quiet. Abraham, however, volunteered that he was supposed to meet a source that evening (R. 315-16).

On November 15, at 8:30 p.m., a caller who the prosecution urged was the Petitioner Sisca, telephoned Logan.[9] The

[9] As will be demonstrated below, the unknown caller of November 15 and 16 could not have been the Petitioner Sisca. See testimony of the Petitioner's experts, Linda Chiari (R. 2303 *et seq.*), Dr. Louis Gerstman (R. 2436 *et seq.*), Dr. Oscar Tossi (R. 2518 *et seq.*), as well as the testimony of Regina Ricks, who testified that Sisca was in Saugerties, New York at or about the time of this telephone call (R. 2682 *et seq.*). In fact, the jury *acquitted* Sisca of the use of the telephone to further the con-

[Footnote continued on following page]

caller complained to Logan that Abraham had not kept an appointment. Arrangements were then made for Abraham to leave a message with Logan so that a meeting could be arranged for the following evening.

At aproximately 10:45 a.m. on November 16, an unknown caller again reputed to be the Petitioner Sisca, but labeled "Doc" in the agent's logs, telephoned Logan and spoke with Abraham. During the course of that telephone call "Doc" asked where Abraham had been the prior evening and arrangements were made to meet at 12:30 that afternoon. No evidence, however, was adduced of any such meeting.

Shortly after 1:00 p.m. on November 20, 1971, "Doc" called Abraham to arrange for a meeting. The two agreed to meet the following Monday (November 22, 1971) at 2 p.m. (R. 324-25). No evidence was ever adduced that Sisca met Abraham on or about November 22, 1971.

At 4:30 p.m., on December 8, 1971, Logan was telephoned by an unknown caller who arranged for Castalazzo to meet Abraham at 5:00 that afternoon (R. 331-332).

Forty-five minutes later, Abraham called Logan and asked, "Did them people call?" He informed her that he was stuck on the parkway, but that he would call again and try to make the meeting by 5:30. No evidence was adduced that any meeting in fact took place.

At approximately 11:20 a.m., on the morning of December 13, Abraham received a telephone call from a man the government urged was the Petitioner Sisca.[10] After passing some amenities, the caller, "Doc," asked to meet him at 5:00 (R. 336-37).

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spiracy here charged. Finally, this Court should note that the government agents themselves noted the caller as "Doc" on their logs describing this telephone call (T. 803, 807-808, 864, 1460). The Court of Appeals, however, chose to ignore these facts, see *infra*, at pp. 41-51.

[10] As indicated in the footnote on p. 9, *supra*, the caller could not have been the petitioner.

At 5:30 that evening, Detective Wright, a member of the "task force," observed Abraham in the vicinity of 150th Street and Seventh Avenue driving in a northerly direction (T. 926-27). Abraham proceeded to the vicinity of Albert Einstein College Hospital on Eastchester Road in the Bronx and in darkness, parked in an area directly in front of the hospital. Simultaneously, Wright concealed his vehicle and assumed a position behind a wall which overlooked the area in which Abraham had parked (T. 929). From this vantage point which was approximately 100 feet from Abraham's vehicle, Detective Wright observed a white male, six feet tall, approximately 30 years old with a Caesar haircut, dark hair, wearing light-colored clothing and standing next to the driver's side of Abraham's car. Another white male wearing a brown sweater, approximately 6 feet tall, 30 years old, with grey hair, was seated in the passenger seat of Abraham's automobile. The male outside the car stated "this car is dirty" and the two white males left Abraham's car, walked across the parking lot to a yellow Buick, made a U-turn and drove off (T. 929-31). Unable to make a positive identification of either of the white males, Wright entered his vehicle in an attempt to follow the yellow Buick. The Buick made a sharp left turn, then a right turn, failed to stop for several traffic lights and then proceeded at a high rate of speed onto Westchester Avenue (T. 932).

At 8:30 a.m., on December 15, 1971, Abraham, after leaving 100-20 Benchley Place, entered his automobile and drove to 461 Olmstead Avenue in the Bronx (T. 525, 934). Several minutes later, Logan and Grant arrived (T. 234, 935-936). Subsequently, Grant left Olmstead Avenue and was arrested in possession of a quantity of heroin (T. 275-76, 648-50, GX 33, 34).

At approximately 11:45, Logan left Olmstead Avenue carrying a shopping bag, entered a Cadillac and proceeded

to drive off (T. 1774-75). She was then stopped and arrested in possession of two bags of white powder (T. 1776-77, GX 65). Following the exit of Grant and Logan, Abraham left 461 Olmstead Avenue, entered his vehicle and proceeded to drive off, followed by several agents of the task force. Following a high speed chase, Abraham was apprehended in possession of a large quantity of heroin (T. 525-27, 936-40).

A search of 461 Olmstead Avenue, a one family residence owned by Abraham's brother-in-law, the Petitioner Hoke, revealed additional contraband, weapons and drug cutting paraphernalia (T. 281-82, GX 35).[11]

Later that day, Abraham admitted that he had purchased 7½ kilograms of heroin in the early morning hours of December 15; that he had paid approximately $26,000 for the drugs; that he had been buying drugs at this quantity for 2½ years on a bi-monthly basis; and that during that time, the price had risen from $21,000 to $26,000 per kilo (T. 325-26, 1922-25).

Following the conclusion of the Government's case, the Petitioners Sisca and Hoke presented extensive proof seeking a rebut certain facets of the government's evidence as it related to them. The factual implications of the defense proof is discussed more fully under Point IV, *infra*.

2. The Wiretaps

A. The Sequence of Events and Authorizations

On September 27, 1971, a Justice of the Westchester County Supreme Court signed an order authorizing a wiretap on the telephone listed in the name of Carol Holder and used by the Petitioner Erroll Holder (GX 59, pp. 1-3).

[11] Similar searches were conducted at the homes of Grant and Logan (10a).

The order was obtained pursuant to Article 700 of the Criminal Procedure Law of New York and 18 United States Code. It was directed "specifically (to) those conversations of her (Carol Holder) husband Erroll Holder."

In addition, the order provided that, "the interception is to be conducted in such a way as to minimize the interception of communication not otherwise subject to eavesdropping . . ."

Based on this order, investigators of the "task force" began on September 28 to intercept and monitor *all* telephone calls made to or from the Holder telephone. The log of that tap, up to and including November 24, 1971 contains approximately 400 pages.

As noted by the Court of Appeals in its decision (6a), relying primarily on information gathered from the Holder tap, an order was obtained in the Supreme Court Bronx County on November 8, authorizing a tap of the telephone listed in the name of Margaret Logan and directed against the Petitioner Abraham. This tap was maintained until December 15, the date of the Petitioner's arrest.[12] Other tap orders were obtained for the telephone of the defendant McBride as well as several others.

B. The Pre-trial Procedures and Motions to Suppress

On November 15, 1973, Petitioners Sisca, Abraham, Holder, Grant, Hoke and Logan moved pursuant to Rule 16(a) *inter alia* for all statements made by each of the defendants; for discovery pursuant to Rule 16(a)(2) and

[12] The order for the Logan tap provides that the interception be conducted in such a way as to "minimize communication not otherwise subject to eavesdropping under the Criminal Procedure Law."

16(b) of the Federal Rules of Criminal Procedure (including all electronic surveillance and the orders and affidavits in support of the orders justifying the same) and for a bill of particulars. Finally, the petitioners moved for an order suppressing all telephone conversations overheard on telephone numbers (914) 969-4368 (Holder tap); and 379-1064 (Logan tap) on the grounds that said evidence and its leads were obtained from wiretap orders made in violation of the Fourth Amendment to the Constitution (R. 28-53).

Responding on November 27, the Government opposed Petitioners' motions, including that of suppression (R. 54-58). Consequently, on November 29, a pre-trial conference was had before the District Court to resolve the discovery issues.

After appropriate arrangements were made, the defense on or about December 5, 1972, began copying and listening to the tape recordings. At that time, the prosecution indicated that its facilities for playing the tapes were limited and suggested that the defense employ a professional recording company to copy the tapes at high speed. The defense accepted the suggestion. Nevertheless, the copying could not be completed until the end of December, 1972. During the copying, the defense determined that the total number of reels of tape to be copied was 223, and that the total listening time was in excess of 700 hours and not 150 hours as represented by the government.

On December 18, 1972, the District Court sustained the validity of the Holder, Logan, McBride and Brown wiretap orders.

Three days later on December 21, 1972, the defense communicated to the Court that in view of the large number of tapes, it would be impossible to listen to them prior to January 3, 1973, the date then set for trial.

Pursuant to that communication, a pre-trial conference was held on December 27, 1972. During the course of that conference, one of the attorneys for the defense informed the Court that as of that date, it was defendants' position that the agents who had executed the wiretap warrants and orders had not "minimized" as required by law. More specifically, counsel for the Petitioners Sisca, Hoke, Abraham, Logan, Grant, and Holder stated:

> "We wish to determine if there is any exculpatory matter in these tapes which may assist our clients. We have found such evidence in the tapes already. We also want to discover whether these tapes may aid us in our belief that certain of these recordings were made prior to the authorization by any court. And also we want to discover whether federal law, specifically Title 18, I think Section 2518, has been violated in that there has been no minimization in accordance with federal law and, I'm sure, the dictates and the direction of the courts in search of the warrants" (R. 159-160).
>
> * * * * *
>
> "We also discovered to our chagrin that the agents and the police who executed the warrants did not follow the directives of federal law, and that is minimization" (R. 164).

There then arose an issue as to the suppression of additional electronic recordings (totally unrelated to the issue of "minimization") to which the District Court responded:

> "Well, the point, it seems to me is quite clear. In the first place, as far as the trial itself is concerned, once you know what the government is putting in or intends to put in by way of affirmative evidence, you will certainly be at liberty to raise, as you develop your own admissibility of anything during the course of the trial. There is no question about that.

> "Now, if for example, you have any affirmative evidence which you claim presently justifies the suppression of anything, any of the taped materials, it seems to me quite clear that that ought to be raised forthwith."
>
> "So that if by any chance, after reading the material, I deem hearing is necessary, we can have a hearing on that at the earliest possible moment and get it out of the way. That is number 1" (R. 180-181).[13]

After the commencement of the trial, but prior to the introduction of any evidence relating to electronic surveillance, counsel for the Petitioner Holder, speaking on behalf of all defendants moved to suppress for failure to comply with the so-called "minimization" provisions of 18 U.S.C. 2518(5) and section 700.30 of the New York Criminal Procedure Law, as well as the warrants themselves (T. 753-770). The District Court reserved decision and the trial proceeded. During the course of that trial it became abundantly clear that the government's case was based almost entirely on the electronic surveillance; and that the "minimization" requirements of Federal and State law had not been met.

C. The Execution of the Warrants

During the course of the trial and after several post-trial hearings Petitioners established beyond any doubt that the requirements of Title 18 Sec. 2518(5) had not been met in the execution of the warrants.

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[13] The Court of Appeals based its decision on the "waiver issue" on its belief that the District Court's statement was in "direct response" to the defense's allegation of failure to minimize. An analysis of the minutes of that hearing reveals that the Court of Appeals totally misconstrued that conference (see *infra*, at pp. 21a-28a).

In summary, those facts were as follows:

1. Each of the plants operated twenty-four hours a day.

2. The Logan plant was continually manned by two or more monitoring agents using at least two tape recorders.

3. The "Holder Plant" was physically manned 12 to 16 hours a day by two agents. For the remaining 8 to 12 hours two tape machines recorded all calls. These were later listened to by the monitoring agents.

4. *All* conversations made on the intercepted telephones were overheard, recorded and logged onto line sheets.

5. On each of the intercepts there was *never* an attempt made by any of the monitoring agents to turn off the tape machines.

6. Hundreds of improperly intercepted calls between doctors and their patients, between children, between uninvolved family members, between the defendants and innocent vendors and merchants and between the defendants themselves were overheard, recorded and logged.

7. The monitoring agents were instructed not to record conversations which might be privileged (*e.g.* doctor-patient, attorney-client and clergyman-confessor), yet these instructions were absolutely ignored.

8. Of approximately 1300 completed calls on the Holder tap, 700 are, using the face of the log only, improperly overheard. Hundreds of additional calls summarized on the log are also improperly overheard.[14]

9. As conceded by the government in its statistical study of the "Holder Tap" and submitted to the District Court after the post-trial hearings, 143 out of 1301 completed calls, or 11% of the overheard calls, related to the subject of narcotics.

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[14] Incomplete, busy, or misdialed calls were discounted.

10. As conceded by the Government in its statistical survey of the "Logan tap", 59 out of 753 completed calls, or 7.8% of the overheard calls, related to the subject of narcotics.

11. *100% of all calls* were *intercepted listened to, monitored, recorded and logged.*

12. No evidence was adduced by the Government to demonstrate that the monitoring agents had any supervision or guidance from any supervising attorney, or authorizing judge.

13. The Government adduced no evidence that at any time during the conduct of the intercepts was a synopsis of calls prepared to formulate guidelines for future interception.

14. The prosecution offered no evidence to show that either supervisory personnel or attorneys or the Court, issuing the warrants received reports during the conduct of the intercepts.

D. The Decision of the District Court on the Issue of "Minimization"

Over the objection of the Petitioners, the District Court reserved decision on the issue of "minimization" pending the results of post-trial hearings in the nature of a "taint hearing". Following the conclusion of those hearings (R. 421, *et. seq.*, R. 458, *et seq.* R. 514, *et seq.*), the District Court in a three-pronged opinion denied the motion.

In its first phase, the Court concluded that although the issue of minimization was discussed and brought to the Courts attention prior to trial, it was not formally raised until after trial had commenced. Consequently, the Court found that as a matter of law the defense had waived its right to contest the admissibility of the wiretap evidence

on minimization grounds (37a). Nevertheless, the District Court then considered the "minimizaiton issue" and concluded that on the facts of this case, the "minimization requirements" (Title 18 U.S.C. 2518(5)) had not been met (37a-45a).

Finally, the District Court considered what remedy should be applied and held that suppression was not appropriate (50a-51a).

E. The Decision of the Court of Appeals

The Court of Appeals in its decision acknowledged that there was a split of authority on the appropriate remedy for failure to minimize (18a-19a). Nevertheless, it refused to consider the merits of Petitioners' "minimization argument" inasmuch as it found that Petitioners had "waived" their right to raise the issue. As we urge *infra*, this decision is erroneous in that it misconstrues both the law and facts on the question of waiver, of constitutional and statutory rights.

Reasons for Granting the Writ

Introduction

This Petition raises pressing and substantial questions of interpretation with regard to the Federal statutory scheme for Court ordered electronic surveillance and its interplay with State permissive earsdropping statutes. Moreover, a number of issues involved raise critically important questions under the search and seizure provisions of the Fourth Amendment and the due-process clause of the Fifth Amendment to the United States Constitution.

Additionally this petition presents to the Court the constitutionality of the continuing drug offender statute (21 U.S.C. 848).

Finally, the issues concerning the remedy available for failure to comply with the execution provisions of the statutes in question have evoked a split of authority between the various Circuits and District Courts. Compare *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md.), *aff'd on other grounds sub nom United States* v. *Giordano*, 469 F.2d 522 (4th Cir., 1972, *cert. granted*, 411 U.S. 905 (1973), *aff'd on other grounds*, — U.S. —, 15 Cr.L. 3033 [15] and *United States* v. *Scott*, 331 F. Supp. 233 (S.D.D.C., 1971) with *United States* v. *Cox*, 462 F.2d 1293 (8th Cir., 1972) and *United States* v. *King*, 335 F. Supp. 523 (S.D. Cal., 1971).

* * * * *

It was only after many years of resistance that Congress was moved to permit the use of court-ordered electronic surveillance, but then only under the most stringent requirements. It is, perhaps, a natural tendency for law enforcement officers to press to the outer limits the strictures which have been placed upon them. Then the outer limits become the norm and the press for wider limits becomes the new goal. The bland assurances given during the lobbying for the passage of legislation authorizing wiretapping that the constitutional rights of the individual to privacy will not be trampled upon by the Government are all but forgotten once the sought-after authority has been enacted into law for institutionalized and Governmently-sanctioned oppression. A line must be drawn. We respectfully submit, those who were charged with the supervision and execution of the wiretaps in this case went far beyond that line. There is hardly a significant aspect of the legislative controls upon electronic surveillance which was not deliberately and wilfully ignored by the monitoring agents herein.

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[15] All references to the opinion of the District Court are cited *infra* as *Focarile* v. *United States* while all references to the opinion of this Court are cited as *United States* v. *Giordano*.

The "Statement of the Case", *supra*, is unusually long and detailed. However, in the face of the substantial omissions in the opinions of the Courts below, there is no other way for us to place before this Court the reality of what occurred here. While ficitons are not unknown to the law, it would be scandalous to place the stamp of regularity upon the procedures followed herein.

I.

The Court of Appeals Erred as a Matter of Law and Fact in Finding a Waiver of the Petitioners' right to contest, pursuant to Title 18 U.S.C. Sections 2518 and 3504 and the Fourth Amendment of the Constitution of the United States, the Admissibility of Forty-two Electronically intercepted telephone calls.

In denying petitioner's motion to suppress the tapes introduced into evidence in the Government's case on the grounds that there was a failure to minimize as required by Title 18, United States Code, Section 2518(5), the Court of Appeals found that while the requisite "minimization" may not been achieved, to suppress on "minimization grounds" (affirming District Court opinion 361 F. Supp. 735), the motion was made untimely (Title 18, U.S.C., Section 2518(10)(b), hence barring the relief sought.

The Court of Appeals' finding that the delay (two days after testimony had begun at the trial) in bringing the "minimization motion" was a knowing and deliberate trial stratagem seeking to gain an unfair advantage is, we submit, a holding totally unsupported by the facts of the case. In its opinion, the Court of Appeals has selectively lifted two paragraphs from the minutes of a pre-trial conference held on December 27, 1972:

[Counsel for the defense]:

> "'We also discovered to our chagrin that the agents and the police who executed the warrants did not follow the directives in the warrants, did not follow the directives of federal law, and that is minimization'."

"In direct response to this statement, Judge Bryan said:

> "'Now, if, for example, you have any affirmative evidence which you claim presently justifies the suppression of anything, any of the taped materials, it seems to me quite clear that that ought to be raised forthwith'" (20a-21a).

A reading of the carefully chosen paragraphs would indicate that the District Court, upon being apprised of the possibility of a "minimization motion," directed that it be brought forthwith. However, not only does a reading of all of the pages involved in this colloquy dispel that thought, but the reader would be greatly shocked to find out that the quote from defense counsel is located some eighteen pages prior to the District Court's statement, which the Court of Appeals has chosen to label a "direct response". Once this disparity is unearthed, it comes as no surprise that immediately prior to the District Court's admonition, defense counsel spoke at great length concerning a completely different matter, that being the possibility that certain Government agents had in their possession illegal wiretapping equipment which was believed to have been used in securing evidence against the Petitioners. Further, a reading of the entire statement by the District Court Judge throws a completely different light upon the interpertation of the paragraph quoted in the Court of Appeals' opinion:

> "Well, the point, it seems to me, is quite clear. In the first place, as far as the trial itself is concerned, once you know what the government is putting in or intends to put in by way of affirmative evidence, you will certainly be at liberty to raise, as you develop

> you own investigations, any questions *as to the admissibility of anything during the course of the trial. There is no question about that.*
>
> "Now, if, for example, you have any *affirmative evidence* which you claim presently justifies the suppression of anything, any of the taped materials, it seems to me quite clear that that ought to be raised forthwith."

The District Court's use of the terminology "affirmative evidence" is indicative of the factors to which it referred. There is, of course, no "affirmative evidence" in a motion to suppress for failure to "minimize" which is based upon the conduct or lack of conduct of Government agents which has already taken place and which cannot be changed or altered, since it has already been reduced to irrefutable document. There would be "affirmative evidence" if defense counsel were to come forward and show that Government agents not only possessed illegal wiretapping equipment, but had in fact used that equipment to obtain suppressible evidence against the petitioners. If by some stretch of the imagination one could conclude that the District Court was referring to "minimization", it most certainly was a less than explicit directive. However, the statement by the District Court at page R. 180 does clearly indicate that petitioners were free to raise *at the time of trial* "any questions as to admissibility of anything during the course of the trial. There is no question about that" (see for example 18 U.S.C. 3504 and *United States* v. *Toscanino*, — F.2d — (C.A. 2, 1974, slip opinion at p. 3519 holding that ("18 U.S.C. Section 3504 is triggered by mere assertion that unlawful wiretapping has been used against a party").

The misinterpretation placed upon the language of the District Court by the Court of Appeals should we submit, be in and of itself sufficient to reverse the decision of that Court. However, in addition to the misconstruing of language, the opinion of the Court of Appeals chose to ignore the very existence of the pre-trial factors and persisted

in labeling the belated "minimization motion" as a deliberate stratagem a conclusion not supported by the facts.

As the minutes of December 27, 1972, indicate, the Government had originally represented that there existed some 150 hours of taped conversations. To defense counsels' consternation, there turned out to be 700 hours of conversation. If this were not enough, as defense counsel bitterly complained, the Government had only that morning revealed that an additional three to four hundred hours of taped conversations existed. This made the total number of hours between seven and eight hundred.[16] Further, neither the McBride tapes nor the Logan logs were provided defense counsel until after the trial actually began. It should be noted that when the Government stated that it had "provided the tapes", that only meant that they were available to be listened to at certain hours in certain locations on a single machine. By the most elementary mathematics, for the defense to have completed listening to the additional tapes by January 3, 1973 (original trial date) or by January 15, 1973 (ultimate trial date) would not only have been a Herculean task, but a physically impossible one. Defense counsel went to such extremes and expense in an effort to complete their study that instead of copying the tapes directly on a one-hour to one-hour basis, they had all of the tapes re-recorded by a television studio specializing in high-speed recording. The Government deliberately fought discovery step by step, deliberately failed to provide defense counsel with the materials necessary to make a proper "minimization motion," and deliberately pushed the case to trial as quickly as possible so that a proper analysis of the pertinent materials would be physically impossible. Not only did the Government suffer no sanction for such conduct, but was indeed, rewarded by the decision of the Court of Appeals.

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[16] This astounding revelation by the Government occurred only one business day before the then firm trial date of January 3, 1973, most certainly an indication of their bad faith.

In reading the Court of Appeals' decision, one gains the impression that in a sneaky, stealthy, underhanded manner and without any prior warning whatsoever the defense sprang upon the District Court and the Government its hidden weapon—a "minimization motion." The facts are absolutely to the contrary. The discussion of "minimization" runs from virtually the first day of pre-trial hearings throughout the entire pre-trial proceedings. That such a motion was formally forthcoming could not have possibly shocked the Government since they were a party to all of these discussions. If defense counsel were seeking an unfair advantage as intimated by the Appeals Court, they would not have mentioned "minimization" at all. Instead, they would have lulled the Government into relying on tainted evidence and then made the appropriate motion. In this case, it is clear that the Government knew for two months that defense counsel were concentrating every available effort to show that "minimization" had not been achieved. However, since the Government could do nothing to alter the inevitable conclusion that on the facts of this case theer had been no "minimization", it sought to withhold the facts from the defense in an effort to thwart as long as possible such "minimization motion".

It is equally obvious that while Title 18 U.S.C. Section 2518(10)(b) provides that such a "minimization motion" must be made before the trial, the additional language "unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion" refers to the present situation. Aside from the fact that "minimization" is a novel concept, as previously indicated, the materials necessary to make a proper formal motion were studiously withheld from defense counsel. Thus, while defense counsel prior to trial were becoming increasingly aware of the Government's failure to "minimize", it was necessary that *all* the tapes and logs be made available to them so that a proper statistical analysis could be made

for the Court's consideration so as to substantiate the Government's failure to "minimize." One must realize and recognize the enormity of the task of compiling such figures for seemingly endless hours of tapes. Plodding along, as best they knew how, but continually reminding both the Court and the Government of the discoveries, defense counsel sought, despite calculated interference, to complete their "minimization motion."

The "opportunity" to make a motion on proper "grounds" presumes of course, the availability of the necessary materials to accomplish the task at hand. That defense counsel sought pre-trial to compile complete statistics based on all of the tapes and all of the logs is much to their credit, for it was not until March 14, 1973 (*United States* v. *Bynum*, 475 F.2d 832 (2d Cir., 1973)) when the Court of Appeals gave some guidelines as to what should be illustrated in a "minimization motion." As the Court in *Bynum* said, at page 836, *the issue of minimization has never been considered by this Court*".

The thought that under the facts of this case there was an "intentional relinquishment of a known right and the deliberate bypass of the orderly and timely suppression procedure" is incomprehensible. The Petitioners herein were sentenced to a total term of imprisonment of one lifetime and one hundred thirty-two years. It would seem that even if the facts were not on the side of the Petitioners, that the Courts below would indulge every reasonable presumption against the waiver of fundamental constitutional rights and that they would not put "form over substance." But no, instead the Court of Appeals sought to parallel a series of cases concerning Rule 41(e) (now 41(f) and Rule 12) of the Federal Rules of Criminal Procedure with the present situation. Even here, some of the cases held that the grounds for bringing a motion to suppress did not lie in any event; *United States* v. *Ellis*, 461

F.2d 962 (C.A. 2), *cert. denied*, 409 U.S. 866 (1972); and *United States* v. *Weldon*, 384 F.2d 772 (C.A. 2, 1967); that the evidence would have been admissible on another theory; *United States* v. *Blackwood*, 456 F.2d (C.A. 2), *cert. denied*, 409 U.S. 863 (1972), or where an actual hearing was had and denied on the merits: *United States* v. *Nicholas*, 319 F.2d (C.A. 2), *cert. denied*, 375 U.S. 933 (1963); *United States* v. *Volkell*, 251 F.2d 333 (C.A. 2), *cert. denied*, 356 U.S. 962 (1958). The fact that the drastic penalty of 'waiver' is conceivably available when one intentionally fails to act in a timely manner, *United States* v. *Bennett*, 409 F.2d 888 (C.A. 2, 1969) does not mean that it has proper application in this case. A motion to suppress for failure to "minimize" is a new remedy with few cases to indicate to conscientious counsel the substantive as well as the procedural ground rules for making such a novel motion. See *Kaufman* v. *United States*, 394 U.S. 217, 227 n. 8 (1970); *Henry* v. *Mississippi*, 379 U.S. 443, 450-451 (1965); *Fay* v. *Noia*, 372 U.S. 391, 438-39 (1963).

In this connection in considering the factor of "waiver," the Court below, we submit, should have been cognizant of the doctrine manifested by this Court that in order for the prosecution to establish a waiver of a constitutional right, it must demonstrate "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 and *Barker* v. *Wingo*, 92 S. Ct. 2182 (1972). See also *Kaulfan* v. *United States, supra.*

Assuming arguendo, however, that the issue of failure to minimize was in fact raised for the first time at trial, we respectfully submit, there still was no waiver. Section 3504 of Title 18 U.S.C. enacted as part of the organized crime control bill of 1970 states:

> "(a) In any trial, hearing, or other proceedings in or before any court, grand jury department, officer agency, regulatory body, or other authority of the United States—

> (1) *upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act, the opponent* of the claim shall affirm or deny the occurrance of the *alleged unlawful act;*
>
> * * * * *
>
> (b) *As used in this section 'unlawful act' means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.* Added Pub. L. 91-452, Title VII Sec. 702(a), October 15, 1970, 84 Stat. 935 (Emphasis supplied)

Inasmuch as a claim of "admissibility" of evidence is generally made at trial, section 3504 clearly contemplates an attack on the illegality of wiretapping for the first time during the trial. See *Gelbard* v. *United States,* 408 U.S. 41.

Moreover, it is now clear that failure to comply with the minimization requirements (Title 18, U.S.C., Sec. 2518) rises to the level of a violation of the defendants' rights under the Fourth Amendment to the Constitution of the United States. See *United States* v. *Focarile,* 340 F. Supp. 1033; *United States* v. *Scott,* 331 F. Supp. 233 (D.D.C., 1971); *United States* v. *George,* 465 F.2d 772 (C.A. 6, 1972); *Desist* v. *United States,* 394 U.S. 244, 246 (1969); and more recently, *United States* v. *Bynum, supra,* and *United States* v. *Tortorello,* 480 F.2d 764 (2nd Cir., 1973). In Tortorello, on pages 30 and 31 of its opinion the Court of Appeals held:

> "It is clear from these decisions that a court should not admit evidence derived from an electronic surveillance order unless after reviewing the monitoring agents, it is left with the conviction that on the whole, the agency have shown a high regard for the *right of priracy* and have done all they reasonable could to avoid unnecessary intrusion . . ."

The clear implication of that holding is the failure to "minimize" violates a defendant's right of privacy and a fortiori rises to the level of a constitutional infirmity. (See for example *United States* v. *Giordano, supra.*)

II.

Did the Court of Appeals err in declining to pass upon the District Court's finding that (a) the minimization provisions of Title 18 U.S.C. 2518(5) had not been met and (b) that the appropriate remedy for lack of compliance was not suppression of the electronic surveillance and all leads derived therefrom?

After an extensive analysis of the proof adduced during trial and post-trial hearings the Court below found in part:

> "There is little doubt in the light of these facts and the nature and extent of the criminal narcotics enterprise being carried on that the monitoring officers were faced with very great difficulties. Nevertheless, it cannot be said in this case that the minimization requirements were satisfactorily complied with.
>
> The test of whether or not the minimization requirements are complied with is not retrospective but contemporaneous. Though retrospective analysis of the pertinency of the calls intercepted may have some value, the monitoring officers must determine contemporaneously when to turn off the intercepting machine and stop listening so as to avoid conversations not authorized by the order. *There were a substantial number of calls here which should have been shut off and not listened to and this was not done. Instead, such calls were overheard and often summarized on the log.* Moreover, whatever the situation was at the outset of the interceptions, there was apparently no

> evaluation of the monitoring as it proceeded to determine which calls should be intercepted and which should not. The interception continued to the end full blast, without the imposition of any restraints or instructions on that subject.
>
> It must be recognized that in authorizing interception for the purpose of obtaining information as to such a widespread narcotics conspiracy as this some non-pertinent calls will necessarily be overheard. But the absence of any precautions to insure minimization here, the number of such calls intercepted and the lack of supervisory techniques impel the conclusion that the minimization requirements were not satisfactorily observed. I so find" (43a-44a, emphasis supplied).

Not unmindful of the substantial authority against its view, the District Court, relying on a search and seizure analogy found that the intercepted phone calls should not be suppressed (44a-51a).

Petitioners respectfully submit that this finding is contrary to 18 U.S.C. 2515 and 2518(10)(a)(iii) and the Fourth Amendment to the Constitution of the United States.

The touchstone of an analysis of the law of "minimization" is *Berger* v. *New York*, 388 U.S. 41 (1967). In *Berger*, this Court in overturning New York's permissive eavesdropping statute held in part that the State statute was unconstitutional inasmuch as it allowed general interceptions because "conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation." 388 U.S. 41, at p. 59. See also *Katz* v. *United States*, 389 U.S. 347 (1967).

As a result of the holding of the Court in *Berger*, Congress enacted Title III of the Omnibus Crime Control Bill

of 1968 to conform to the Constitutional mandates of *Berger.*

Consequently the Crime Control Bill, 18 U.S.C. 2518(5) provides in part:

> "Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days."

"Minimization" under Section 2518(5) has been defined as an "intercept procedure (which is) conducted so as to reduce to the smallest possible number the interception of 'innocent' calls." *United States* v. *Focarile, supra,* 340 F. Supp. at p. 1047. As stated by the District Court in *Focarile* this is but another way of saying that the "methods and efforts utilized in minimization must be reasonable, the traditional and acceptable standard of measuring the validity of a search under the Fourth Amendment . . ." and must allow 'no greater invasion of privacy than (is) necessary under the circumstances'" *Berger* v. *New York, supra; Katz* v. *United States,* 389 U.S. at p. 355" Cf. *United States* v. *Tortorello, supra.*

The District Court in *Focarile* continued by stating "It is *certainly unreasonable* and goes beyond the limits of practibilities or feasibility in every case to give a seizing officer what the *Berger* Court characterized *as* a *'roving commission to seize any and all conversations'* 388 U.S. at p. 59."

An analysis of the several cases in point makes it crystal clear that what occurred here was in fact the "roving com-

mission" condemned by *Berger*, Title III, and the Fourth Amendment.

In *United States* v. *Scott*, 331 F. Supp. 233 (D.C.D.C., 1971) the wiretap order provided, as it had to, that its execution should be "conducted in such a way as to minimize the interception of communications that are not otherwise subject to interception . . ." In deciding a motion to suppress all wiretap evidence, the District Court made note of that provision and then stated, at page 247 that:

> "It is unquestionable that the intent of the order was clearly expressed . . . Yet in spite of the order's unequivocal mandate the record reflects that *virtually all* conversations were overheard and recorded . . . and that approximately 60% of the calls intercepted were completely unrelated to narcotics. Neither of these facts standing alone is conclusive but together they strongly indicate the indiscriminate use of wire surveillance that was proscribed by *Katz* and *Berger*. . . . The surveilling agents did not even attempt lip service compliance with the provision of the order and statutory mandate but rather completely disregarded it. The record is devoid of any attempt, no matter how slight, to minimize the interception of unauthorized calls."

Having made this finding, the District Court suppressed all wiretap evidence and all leads derived from such evidence.

In the instant case, *all* calls were intercepted overheard and recorded. Moreover, there was absolutely no supervision by the authorizing justice or district attorney, nor were there periodic reports concerning the nature of the overheard material. In addition, no guidelines were established by the agents and those instructions that were given were ignored.

In *United States* v. *George, supra,* there was a violation of a wiretap order authorizing surveillance only when particular individuals were using the telephone. Nevertheless, the electronic interception therein was conducted without regard to the terms of the order. The Court of Appeals finding that the protective limitations of the order had been defeated, held the wiretap evidence inadmissible and ordered a new trial which would exclude any wiretap evidence procured in violation of the order. The Court of Appeals in so ruling found not only a violation of the statute but constitutional infirmity under *Desist* v. *United States,* 394 U.S. 244, 246 (1969).

In *United States* v. *King,* 335 F. Supp. 523 (S.D. Calif., 1971), the surveilling agents recorded every conversation which took place over the wire. Stating that "indiscriminate interception (of communications) by Government agents is an invasion of privacy not to be tolerated," and that "the object of minimization is to prevent the wiretap from turning into the kind of general search and wholesale invasion of privacy decried by the Supreme Court in *Berger* . . . and . . . *Katz* . . .", the District Court held that the mandatory "minimization requirements" had not been met.

In both *United States* v. *Scott, supra,* and *United States* v. *King, supra,* the Courts found that the "minimization requirements" of 18 U.S.C. § 2518(5) had been violated. *The two courts, however, disagreed on the appropriate remedy. In Scott, the Court suppressed all the wiretap evidence and its leads.* In *King,* however, the Court suppressed only those conversations, the interception of which was beyond the scope of the wiretap order. *Common sense dictates that this Court adopt the remedy applied in Scott rather than the non-remedy of the King case.*[17]

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[17] The Courts of the State of New York have followed the rationale of *Scott.* See *People* v. *Castania,* 73 Misc. 2d 166; *People* v. *Holder,* 69 Misc. 2d 863 and *People* v. *Holder* —— Misc. 2d —— (Cty. Ct. West. Cty. construing the same tap here in issue).

In *United States* v. *Focarile, supra*, the two cases—*Scott* and *King*— were analyzed and compared. The *Scott* remedy was adopted. The District Court summed up the reason for its choice, at pages 1046-47, as follows:

> In this Court's opinion the minimization requirement of Section 2518(5) would be illusory if it were enforced on an item-by-item basis by means of suppressing unauthorized seizures at trial after the interception is a fait accompli . . . Knowing that only "innocent calls would be suppressed, the government could intercept every conversation during the entire period of a wiretap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III . . . For these reasons, this Court rules that a faliure by the government to comply with the Section 2518(5) minimization requirement would require total suppression of all of the communications intercepted.

More recently this Court in *United States* v. *Giordano, supra*, was faced with the determination of whether the Government sufficiently complied with the required application procedures [18] of Title III of the Omnibus Crime Control Act (18 U.S.C. 2516(1)) and, if not, whether evidence obtained as a result of certain electronic surveillance was admissible at a criminal trial (18 U.S.C. 2518(10)(a)(i)).

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[18] In *Giordano, supra*, since no question was raised concerning the manner of conducting the court-approved interceptions of Giordano's telephone, this Court was not called upon to decide whether 2518(10)(a)(iii) was violated and if so, what the appropriate remedy was for such violation (see footnote 13 of the Court's opinion).

This Court held that the authorization procedure used in *Giordano* was improper and therefore evidence obtained thereafter must be suppressed:

> "We conclude that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him and that primary or derivative evidence secured by wire interceptions pursuant to a court order issued in response to an application which was, in fact, not authorized by one of the statutorily designated officials must be suppressed under 18 U.S.C. section 2515 upon a motion properly made under 18 U.S.C. section 2518(10)(a). Accordingly, we affirm the judgment of the Court of Appeals." (15 Cr. L. at p. 3034).

Moreover, in its discussion of what remedys are available for the different genres of violations of Title III, Mr. Justice White concluded:

> "The argument of the United States has substance, and it does appear that paragraphs (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i). But it does not necessarily follow, and we cannot believe, that no statutory infringements whatsoever are also unlawful interceptions within the meaning of paragraph (i). The words "unlawfully intercepted" are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy *any* of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extra-

> ordinary investigative device" (15 Cr. L. at p. 3040, emphasis supplied).

See also, *United States* v. *Gelbard*, 408 U.S. 41 (1973).

We respectfully submit that it is beyond dispute that the wiretap surveillance in this case constituted a violation, as clear as it was gross of the statute, the orders and the general search prohibitions contained in the Fourth Amendment of the United States Constitution.

III.

21 U.S.C. §848 Is Unconstitutional On Its Face In That It Is Vague And Indefinite.

The statute under which the Petitioner Abraham was sentenced to life imprisonment, 21 U.S.C. §848 is unconstitutional on its face. The terminology of this statute (reproduced as Appendix "E") is both vague and uncertain, failing to alert potential offenders of the proscribed conduct and lacking in ascertainable standards so to permit both the Court and the jury to properly perform their functions.

The standard test for vagueness is to be found in *Connolly* v. *General Construction Co.*, 269 U.S. 384 (1923), where this Court held:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement. . . . And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

This concept was further commented on in *Ricks* v. *District of Columbia*, 414 F.2d 1097 (D.C. Cir., 1968), at 1101:

> "Definitional uncertainty is an open invitation, if indeed not inevitably an antecedent to virtually unrestrained administration."

While the courts have been struggling with the problem that certain legislation is vague and indefinite, there appears to be no deviation from the general principle that criminal statutes must be sufficiently definite in stating the conduct proscribed and provide reasonable standards for the application of the statute. Provisions of law which do not meet these requirements encourage arbitrary and erratic convictions. *Papachristou* v. *City of Jacksonville*, 92 S. Ct. 839 (1972). As far back as 1874, this Court recognized the problem of vague and indefinite legislation. As the Court said in *United States* v. *Reese*, 92 U.S. 214, 221, 23 L.Ed. 563.

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

The history of cases following *United States* v. *Reese, supra*, indicates that where guidelines for judges and juries are so loosely drawn so as to permit speculation and surmise to be substituted for reason, then such legislation will not stand the test of constitutionality. There must be an ascertainable standard of guilt. *United States* v. *Cohen Grocrey Co.*, 255 U.S. 81 (1921). There cannot be a separate standard for each case. *United States* v. *Vuitch*, 402 U.S. 62. For where statutes are drafted in an overly broad manner, they indeed prevent the effective assistance of counsel. *United States* v. *Cohen, supra; Coates* v. *Cincinnati*, 402 U.S. 611, (1971); *Bouie* v. *City of Columbia*, 378 U.S. 347, (1964); *United States* v. *Harriss*, 347 U.S. 612,

(1954). While a statute may permit a jury to determine "reasonableness" (*United States* v. *Ragen*, 314 U.S. 513, (1942); *United States* v. *Spector*, 393 U.S. 169, (1952)), that is not to say that statutory guidelines may be so loose or uncertain so as to reduce the function of the triers of the fact to guesswork and speculation. *Lanzetta* v. *New Jersey*, 306 U.S. 451, (1939); *Winters* v. *New York*, 333 U.S. 507, (1948). For where legislature provisions are vague and uncertain, the application of the details of the offense charged will not serve to save the statute. *United States* v. *Harris, supra.*

The legislative history of Section 848 indicates that it traveled a rocky road indeed. See III U.S. Cong. & Admin. News 1970, pp. 4648-4652 (reproduced as Appendix "E-1"). The concern of the Congress with respect to the proposed statute was well founded. Their comments as to the vagueness of the terms employed was indicative of their perceptiveness. While Congress has a right, indeed a duty, to legislate in an effort to curb a public ill (narcotics), such laudatory motives do not relieve it of its responsibility to frame such appropriate legislation within constitutional guidelines. *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 679, 88 S. Ct. 1298 (1968); *People* v. *Kahan*, 15 N.Y. 2d 311. This is particularly true when the legislation is attempting to create a special category of offenders. Indeed, the legislative history of the statute (Title 21 sec. 848) indicates that the implementation of such a provision originated with the Justice Department, whose efforts in that regard appeared totaly insensitive toward constitutional rights. Such a "special offender" statute which carries with it a potential sentence of life imprisonment must not be permitted to employ loosely worded standards incapable of definition and application. If, as this Court had said in *NAACP* v. *Button*, 371 U.S. 415 (1963); "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms,"

with regard to First Amendment privileges, then it must apply with all the more vigor toward legislation which seeks to deprive an individual of life and liberty without due process.

An analysis of Section 848 indicates that numerous requirements of the statute are worded in such a fashion so as to be incapable of proper judicial instructions or ascertainable by a jury through the use of reasoning. The felony violation of Chapters I or II must be:

"(1). A part of a continuing series of violations; (2) Undertaken by such person in concert with five or more other persons; (3) With respect to whom such person occupies a position of organizer, a supervisory position, or an other position of management; and (4) From which such person obtains substantial income or resources." To characterize this statute as inarticulate in draftsmanship is to be exceedingly generous. The statute is a veritable can of worms, the enforcement of which would defy a jury of Solomons. While this Court has sanctioned a jury's determination of "reasonableness" (*United States* v. *Regan, supra*), or such language as "readily convertible" (*United States* v. *Molso,* 443 F.2d 463 (2nd Cir.) *cert. denied* 404 U.S. 983 (1971)), never has legislation which contains such a fertile field for speculation been so sanctioned. Cf. *United States* v. *Collier,* 358 F. Supp. 1351 (E.D. Mich. 1973) and *United States* v. *Manfredi,* 488 F.2d 601 (2nd Cir. 1973) *cert. denied sub nom. LaCosa* v. *United States,* — U.S. — (6/3/74). The statute which sets down four requirements in addition to the finding of a felony violation of Subchapter I or Subchapter II fails in its effort to bring any semblance of an ascertainable standard to any of these requirements. What constitutes a series of violations? Who shall be included or excluded in the five or more persons? What constitutes an organizer, supervisor or manager? And what income is considered substantial? The puzzlement which

results from the loosely worded draftsmanship is reflected firstly in the struggles of the trial judge [see minutes of charge] T. 3354-3357 and inevitably in the efforts of the triers of the fact to determine what is necessary to fulfill the four categories of requirements. Where a jury is called upon to make a determination, under such a statute, their verdict is invariably based upon conjecture and surmise. The lack of ascertainable standards of guilt similarly fetters defense counsel, who must struggle to find a meaning for categories so broad that they defy definition. One would think that if there existed such a persistent effort on behalf of the Justice Department to secure the passage of legislation aimed at a special category of persons, that this legislation would have reflected at the very least reasonable guidelines as to who occupies this category. Where such a drastic punishment is involved, the parties vulnerable to such sanction should be readily discernible by both judge and jury. Statutes carrying identical punishment have made their application infinitely more clear by choosing unimpeachable standards (N.Y. Penal Law, Book 39, §§ 220.00 *et. seq.*, Controlled Substances Offenses punishments rests on quantity of narcotics).

Similarly, Section 848 finds no safe retreat in a common law background or venerable interpretation spanning numerous court interpretations. *Jordan* v. *De George,* 341 U.S. 223, (1951). Instead, this relatively new statute which purports to be a major deterrent only results in confusion, as in this very case, where the Government's evidence at best indicated that Abraham was a supplier of numerous people. There was not one shred of evidence to show that Abraham organized, supervised, or managed the other defendants in any manner whatsoever. The confusion which resulted from overlapping evidence resulted in a verdict which could not have possibly rested on reasoned grounds. It has been said that clearness is the most important matter in the use of words. Surely the word must accord with the deed. It is

fundamental to the principles that we hold so dear to our policy that a person should not be subject to the inconsistent, the uncertain, the unknown and the arbitrary. A statute such as the one in question which confounds the reasoning man and eludes the elementary standards of certainty must be struck down. The competent administration of criminal justice is a difficult enough task without the burdening of judge and jury with a statute so lacking in specificity so as to render any possible interpretation frivolous. Appropriate legislation entails appropriate guidelines. Lacking the standards, the achievement of due process is impossible. Confusion and speculation have no place in the true administration of justice, and that which promotes these ills are statutes whose vagueness and uncertainty result in a substitution of conjecture for reason.

IV.

The Petitioner Sisca proved by substantial evidence that he had not used the telephone in furtherance of a conspiracy to violate the narcotics laws and the jury so acquitted him of that count. Did the Court of Appeals—despite the petitioner's substantial evidence of innocence on the telephone count—violate the Petitioner's right to due process of law by assuming that he in fact did use the telephone so as to sustain his participation in the conspiracy as charged in the indictment?

The Court of Appeals specifically considered the telephonic evidence introduced against the defendant Sisca in sustaining the sufficiency of the evidence with respect to the conspiracy count. This, in spite of the fact that the defendant had introduced overwhelming evidence of his innocence with respect to use of the telephone in furtherance of the conspiracy and that the jury had acquitted him on

that count. That it was necessary for the government to prove that Sisca was both present at an alleged meeting at Albert Einstein Hospital on December 13, 1971 and the speaker on the four telephone conversations (November 15, 16 & 20, 1971 and December 13, 1971) in order to sustain the sufficiency of evidence to support the conspiracy count is uncontested, particularly in light of the charge of the District Court (Fn 20—*infra*) and the obvious implication of the Court of Appeals' opinion (14a-15a).

This Court has held in *United States* v. *Glasser*, 315 U.S. 60 62 Sup. Ct. 457 (1942) at p. 80:

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States* v. *Manton*, 2 Cir., 107 F.2d 834, 839, and cases cited."

The views expressed in *Glasser* presume that there is "substantial evidence." This particular facet of the *Glasser* holding is virtually a direct quote from the case cited therein, *United States* v. *Manton*, C.A. 2, 1938, 107 F.2d 834 at p. 839. Both *Manton* & *Glasser* call for a finding that there is "substantial evidence" prior to applying the test "that evidence must be viewed in the light most favorable to the government when reviewed on appeal". Therefore, it is necessary to briefly review the paucity of evidence introduced against Sisca and the substantial evidence introduced to establish his innocence. This brief analysis will clearly illustrate that no substantial evidence existed and the Circuit Court's consideration of rejected evidence was a violation of due process. The main thrust of the government's case against Sisca was that he was a participant in four telephone conversations (November 15, 16, 20 of 1971 and December 13, 1971) made to other members of the

alleged conspiracy (Logan—1, Abraham—3). The government introduced evidence that Sisca was a participant in four telephone conversations by calling Special Agents Harris and Eaton, Detective Alberti and Assistant United States Attorney Watson, each of which testified to a brief conversation they had had with Sisca and each concluded that based on these conversations, they identified the voice of the caller as Sisca's. In addition to the brevity of their opportunity for acquiring a knowledge of Sisca's voice, they call candidly admitted that they had never spoken to Sisca on the telephone. In response to this tenuous identification, the petitioner called forth the world's leading experts in voice identification, all of whom agreed that he was not a participant in any of the questioned phone calls. Additionally, the petitioner called a disinterested witness, whose testimony conclusively showed that it was both geographically and mathematically impossible for Sisca to be the caller on November 15 and 16 of 1971.

The first expert called by the petitioner was Miss Linda Chiari, a voice-print technician who was employed by Voice Print Laboratories. Basing her opinion upon extensive conversations with defendant Sisca, both recorded and unrecorded and a lengthy spectrographic and aural analysis of the trial tapes, she unequivocally concluded that Sisca was not a participant in any of the questioned telephone conversations.

Dr. Louis J. Gerstman, Professor of Speech and Hearing Sciences at City University, another conceded expert in voice identification, accoustic phonetics, and linguistics, testified that in his expert opinion it was impossible for Sisca to have been the voice on the questioned telephone tapes (T. 2449, DX, AA). Dr. Gerstman based his opinion on several hours of conversation with Sisca, taken together with an analysis of tapes in question andf composite tapes which he prepared.

Dr. Oscar Tossi, the Director of Speech and Hearing Science Research Laboratory and Director of the Communication Research Laboratory of Michigan State University, considered the foremost expert in the world on voice identification, corroborated the findings of Dr. Gerstman. Dr. Tossi's opinion was based on numerous conversations with Sisca which spanned over an entire day and allowed him (Tossi) to observe the petitioner conversing under myriad conditions. Dr. Tossi's conclusion that Sisca could not possibly be a participant in the questioned telephone conversations (T. 2554, 2564-65) was buttressed by special comparison tapes which he made.

Ernest W. Nash, a lieutenant in the Michigan State Police and the officer in charge of the voice identification unit of the State Scientific Crime Laboratory corroborated the findings of Chiari, Gerstman & Tossi (T. 2623 *et seq.*). Using both aural as well as voice print techniques, this conceded expert, who had never before testified on behalf of defense, concluded that Sisca's voice did not appear on any of the four questioned conversations.

The government, despite this overwhelming evidence and despite the fact that two of the defense experts (Tossi and Nash) operating under a grant from the Justice Department were to be called as experts on behalf of the government in another case, launched what might be best described as a pitiful attempt at rebuttal. The government first called Dr. Barry Hazen, an employee of a dental research center, who after a brief *voir dire* was rejected by the Court as most certainly not an expert in the field of voice identification. Continuing this unscrupulous effort to impeach the very experts they intended to use to obtain convictions, the government called the irrepressible Dr. Ralph Vanderslice, an assistant professor of communication services at the City University, who modestly declared that he did not have the ability to determine who was in fact the telephone talker nor did he believe that anyone else pos-

sessed that ability. Dr. Vanderslice's rejection of the spectrographic analysis is most curious, considering that he admitted not having performed such a test in over five years and had not operated any of the new machines on which the trial spectrographs were made.

If this total imbalance of evidence were not enough to demonstrate the clear reasoning behind the jury's total rejection of the government's contention that Sisca was the speaker on the questioned tapes, the testimony of Regina Ricks would close the door to any speculation on this point. Miss Ricks, who was a waitress at a restaurant in Saugerties, New York, had often served Sisca and his family at the place where she worked. Her testimony was that on November 15, 1974, she observed Sisca in the restaurant shortly after 4:00 a.m., eating a "hunter's breakfast" (T. 2688). Later that same evening, she observed him eating dinner and celebrating his birthday from 7:00 p.m. until at least 11:00 p.m. and possibly into the morning hours of November 16, 1971. Miss Ricks stated that she knew November 15th was Sisca's birthday and this fact is born out by government's documents. This uncontradicted testimony, when read in conjunction with the conversations of November 15th and November 16th indicates by both the use of logic and logistics that it was impossible for the petitioner Sisca to have been the caller in either of these conversations. It is clear from the conversations of November 15th and November 16th that the caller arrived at a location at 8:00 and left not finding Abraham. Similarly, the calls reflect that Abraham was at the same location from 7:00 p.m. to almost 8:00. Miss Ricks' testimony of Sisca's activities on November 15th and 16th, 1971 precluded any possibility that Sisca could have been the party who was at another locale waiting for Abraham. Further, Saugerties was conceded to be better than a two hour drive from Abraham's residence, and no testimony was elicited nor could it have been elicited that Abraham was at the Saugerties restaurant on November 15, 1971 at 7:00 p.m.

If the abundant scientific evidence introduced on behalf of Sisca coupled with the testimony of Regina Ricks were not sufficient to dispel the most adamant prosecutorial mentality, direction should be given toward the government's telephone logs which referred to the caller in each of the four telephone conversations as "Doc", while it was conceded that Sisca's only nickname was "Funzy" and "Funzy" was the name that the government agents knew him by. (See also the face of the indictment).

The other fragment of evidence introduced against the petitioner was an alleged meeting at Albert Einstein Hospital on December 13, 1971.

The testimony given concerning this meeting came from three New York City policemen, Detective Wright, Ptl. William J. McGroaty and Detective Donald Cole. The inconsistencies and tenuous nature of the identification of Sisca as a participant of the meeting of December 13, 1971 indicates the incredible weaknesses surrounding this portion of the government's evidence. Detective Wright testified that he had observed Abraham drive to the vicinity of Albert Einstein Hospital, Bronx County, New York and, subsequently, from a vantage point some 100 feet away, he saw Abraham standing in the parking area of the Hospital speaking with two white males, each about 6 feet tall, over 200 lbs. and about 30 years of age. Wright further testified that two white males left the parking lot in a yellow Buick, made several sharp turns, failed to stop for several traffic lights and proceeded at a high rate of speed onto Westchester Avenue. Wright was unable to relate any conversation which may have taken place and could not identify the individuals other than Abraham, save to say that they were over 6 feet tall and weighed in excess of 200 lbs. (T. 959-64; GX. 3, 5, 1, 9). Ptl. McGroaty then testified that upon being advised that a yellow Buick was approaching his vantage point, he observed that

very car drive slowly up a hill adjacent to the Hospital, stop next to his vehicle and continue up the hill (T. 1273). Inside the car, McGroaty stated that he observed two white males and he continued to keep the Buick under surveillance until it reached Westchester Avenue, when it was lost in traffic (T. 168, 1689, 1700). The following day, December 14, 1971, McGroaty stated that as a result of his observations, he identified a photograph of the defendant Sisca as the passenger in the yellow Buick (T. 1276, 1281, 1301, 1689). Further, in a written report dated December 13, 1971, McGroaty described the passenger of the yellow Buick as being 6 feet tall, weighing between 205 and 215 lbs.

Detective Cole testified that while traveling in a random fashion throughout the local streets in the area of Albert Einstein Hospital, he observed a yellow Buick stopped for a red light or stop sign and he pulled up next to it and observed two white males for a period of 30-35 seconds from a distance of 3-4 feet (T. 1414-18). The yellow Buick then made a right turn in front of Detective Cole and proceeded to the Westchester Avenue at approximately 35 m.p.h. Cole identified the passenger in the Buick as Sisca.

However cross-examination and production of relevant government documents showed the testimony of these three policemen not only to be irreconcilable, taken collectively and severally, but to smack of the very flavor not merely indicative of error or faulty memory, but of a deliberate attempt to pervert the truth. Consider that Wright who was first to observe and follow the Buick in question testified that the car made a sharp turn and proceeded at a high rate of speed onto Westchester Avenue, while both McGroaty's and Cole's testimony not only failed to cast the aura of a high speed chase, as did Wright, but contended that their alleged observations were made when the car "slowly drove up a hill . . . stopped next to his vehicle . . . and continued up the hill . . ." (McGroaty) or "stopped

for a red light or stop sign" (Cole).[19] The incredible comparison between fact and government fantasy continues throughout the testimony of these three policemen. Wright described the passenger in the car as over 6 feet tall and weighing in excess of 200 lbs. McGroaty, in his report of the very same day (December 13, 1971) describes the passenger as being 6 feet tall and weighing between 205 and 215 lbs. It becomes difficult to conclude that Sisca was in fact this passenger when it was irrefutably established at the trial that Sisca was 5' 8" tall and weighed 170 lbs. (T. 965-66). The unconscionable effort of the government to subvert the truth and convict an innocent man who had never before been arrested or convicted of any crime save petit larceny is further and perhaps more completely reflected in the testimony and the photographic identification testimony of McGroaty. McGroaty swore under oath, not once but four times, that on December 14, 1971 as a result of his observations, he identified a photograph of Sisca as the passenger in the yellow Buick (T. 1276, 1281, 1301, 1689). It was conceded, and most reluctantly conceded, later in the trial that the photograph which McGroaty, under oath, testified that he had identified on December 14, 1971, was in fact not even in existence until January, 1972 (Tr. 1574). Can an observer find one iota of truth in the testimony of these three men? Wright described the flight of the yellow Buick as high speed, sharp turns, cGroaty and Cole contended that the yellow Buick was traveling in such a manner so as to permit observation during its slow ascendency of the hill, its stopping for a

[19] It is difficult to determine Cole's testimony since at the so-called Wade hearing, he contended that the yelllow Buick had in fact pulled alongside his vehicle (T. 1317-18), while before the jury he testified in a wholly different manner (T. 1417-18). Further, Cole's identification of Sisca was attempted to be bolstered by an identification of photographs in August, 1972, but true to the inconsistent nature of his testimony, Cole could only identify one of the two pictures, both of Sisca, that were part of the photograph array.

red light or stop sign; Wright and McGroaty describe the passenger as over 6 feet and in excess of 200 lbs., yet McGroaty and Cole contend that Sisca, who was 5'8", weighing 170 lbs. was the passenger; Cole says at the Wade hearing that the Buick pulled along side of him (T. 1317-18), yet before the jury he testified differently (T. 1417-18); Cole can identify one photograph of Sisca, yet cannot identify a second photograph of equal quality contained in the same array; McGroaty swears under oath that one day after the incident December 14, 1971), he identified a photograph of Sisca which, in fact, was not even in existence at the time of his alleged identification.

If the irregularities and inaccuracies, planned and otherwise, in the testimony of the government's witnesses were not sufficient to cause one to discount such testimony entirely, the petitioner called in his defense Eugene T. Horgan, an engineer and retired police lieutenant and Richard C. Levere, a lighting engineer employed by the Holophane Company, a manufacturer of lighting equipment. Both Mr. Horgan and Mr. Levere testified to the dim and inadequate lighting conditions resulting from the old wooden style light posts in the areas which the government witnesses contended they observed Sisca on December 13, 1971. Levere opined that to make a visual identification as described by the prosecution's witnesses would be extremely difficult if not impossible under the lighting conditions at the places in question (T. 2661-62, T. 2653-54; DX KK, LL). In other words, Levere concluded that one could probably see that an automobile contained persons but that features could not be discerned (T. 2663). Further, the headlights of a car would interfere with one's ability to see rather than act as an aid (T. 2666-67).

An investigation of the "evidence" submitted by the Government in this trial, whether done in a cursory manner or upon studied reflection, would not result, even under the most strained construction, in the conclusion that there

existed "substantial evidence". Under the circumstances and facts of this case, for the Circuit Court to assume that Sisca was the caller in the questioned telephone conversations in their effort to find a sufficiency of evidence to sustain the conspiracy conviction is a clear violation of due process. Not only was the Government's evidence weak and tenuous when taken as a whole, but their efforts to show that Sisca was the telephone caller border on frivolous. Where the petitioner has gone forward with such substantial and conclusive evidence completely rebutting any possible implication in the questioned telephone calls and the jury verdict so agrees, any further consideration of this evidence is irreconcilable with the most elemental principles of due process. This is particularly true where the jury, in its finding of guilty on the conspiracy count, has apparently disregarded the instructions of the trial Judge.[20] *United States* v. *Schneider,* 106 F. Supp. 906, D.C. Cal. 1952.

This disregard is not surprising when a man such as Sisca, against who there is little or no evidence, is tried together with 18 others, almost all of whom were found in possession of narcotics, narcotics paraphernalia, and large sums of money. The tendency of the jury to "lump together" and "sweep away" all defendants is a very prevalent danger. The peril is all the more imminent when, as char-

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[20] The Court charged (T. 3377-8):

"As with all other defendants, it is up to you to evaluate all the evidence and determine whether or not the prosecution has shown beyond a reasonable doubt that Sisca participated in the conspiracy with knowledge of its purposes and used the telephone in its purposes. If you find that this was shown beyond a reasonab'e doubt you may find him guilty, but if you find either that the voice on the telephone, the four telephone calls, was not shown to be that of Sisca or that Sisca was not shown to be a participant in the Einstein Hospital occurrences on December 13th or both, or that the evidence as a whole is insufficient to show guilt beyond a reasonable doubt, I charge you, you must find him not guilty."

acterized by the prosecutor, the case is a "hodge podge" (T. 3281).

While it has been said that Courts of Appellate Review have a proper interest in not disturbing the verdicts of juries, such interest should not result in the sanctioning of a gross miscarriage of justice. To permit such a strained resurrection of affirmatively rejected evidence in an effort to preserve a verdict is a license not granted by *Manton, Glasser,* or the Constitution. There is the greater interest which is to be found in all Courts and that is to see that all convictions rest on proper and sufficient evidence. To do otherwise . . . is to abandon a singularly important function. In truth, the greatest function of all Court of Appellate Review is to be ever vigilant to the erosions of due process and to quickly stem efforts to proscribe constitutional rights in the name of expediency. The only true interest in the finality of litigation is that finality which is achieved with due process.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted; the judgments of conviction should be reversed and a new trial should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1855

ALPHONSE SISCA, WILLIE ABRAHAM, WALTER GRANT, MARGARET LOGAN, ROBERT HOKE and ERROLL HOLDER,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT APPENDIX TO JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX TO APPENDIX

PAGE

Appendix A—Opinion of the Court of Appeals 1a

Appendix B—Opinion of Frederick van Pelt Bryan, District Judge 27a

Appendix C—Relevant Provisions of Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 ..... 52a

Appendix D—Relevant Statutes 67a

Appendix E—Relevant Amendments of the United States Constitution 69a

Appendix E-1—Legislative History P.L. 91-513 Additional Views 70a

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 445, 448, 458, 474, 476, 486—
September Term, 1973.

(Argued November 26, 1973 Decided May 10, 1974.)

Docket Nos. 73-2017, 73-2045, 73-2178-79,
73-2181, 73-2185

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALPHONSE SISCA, WILLIE ABRAHAM, WALTER GRANT, MARGARET LOGAN, ROBERT HOKE, ERROLL HOLDER, WILLIAM BROWN, LEONARD ELLINGTON, and LAVERN MCBRIDE,

Appellants.

Before:

MOORE, HAYS and TIMBERS,

Circuit Judges.

Appeals from judgments of conviction after jury trial in the Southern District of New York, Frederick vanPelt Bryan, *District Judge,* finding all appellants guilty of conspiring to distribute hard narcotics in violation of 21 U.S.C. § 846 (1970), finding all appellants except Sisca and Hoke guilty of using communication facilities in furtherance of the conspiracy in violation of 21 U.S.C. § 843(b) (1970), and finding appellant Abraham guilty of engaging in a continuing criminal enterprise involving hard nar-

cotics in violation of 21 U.S.C. § 848 (1970), the principal issues on appeal relating to the sufficiency of the evidence, the government's alleged failure to "minimize" its electronic surveillance and the propriety of the district court's denial of appellants' motions to suppress wiretap evidence as untimely. 361 F. Supp. 735 (S.D.N.Y. 1973).

Affirmed.

GINO GALLINA, New York, N.Y. (Lenefsky Gallina Mass Berne & Hoffman, New York, N.Y., on the brief), *for Appellant Sisca.*

HENRY J. BOITEL, New York, N.Y. (Lenefsky Gallina Mass Berne & Hoffman, New York, N.Y., on the brief), *for Appellants Abraham, Grant and Logan.*

ROBERT H. KIERNAN, New York, N.Y. (Lenefsky Gallina Mass Berne & Hoffman, New York, N.Y., on the brief), *for Appellant Hoke.*

JOHN L. POLLOK, New York, N.Y., *for Appellant Holder.*

EDWARD GASTHALTER, New York, N.Y., *for Appellant Brown.*

ROBERT P. LEIGHTON, New York, N.Y., *for Appellant Ellington.*

GILBERT EPSTEIN, New York, N.Y., *for Appellant McBride.*

W. CULLEN MACDONALD, Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty., and John D. Gordan III, Asst. U. S. Atty., New York, N.Y., on the brief) *for Appellee.*

Appendix A

TIMBERS, *Circuit Judge*:

Appellants Alphonse Sisca, Willie Abraham, Walter Grant, Margaret Logan, Robert Hoke, Erroll Holder, William Brown, Leonard Ellington and Lavern McBride[1] appeal from judgments of conviction entered upon jury verdicts returned in the Southern District of New York on February 23, 1973 after a six week trial before Frederick vanPelt Bryan, *District Judge,* finding them guilty of conspiring to distribute hard narcotics in violation of 21 U.S.C. § 846 (1970) (Count One); finding all except Sisca and Hoke guilty of using communication facilities in furtherance of the conspiracy in violation of 21 U.S.C. § 843(b) (1970) (Count Three); and finding Abraham guilty of engaging in a continuing criminal enterprise in-

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[1] In addition to the nine appellants whose appeals are before us, the indictment named nine other defendants. Of these, motions for judgments of acquittal were granted as to Theodore Johnson, Gerald Hartley, Milton Basemore and Cassandra Sullivan; Benjamin Castalozzo, Parris Sizemore and Herbert Owens were fugitives at the time of trial; the case against Cleo Dingle was severed prior to trial; and Carol Holder, who was convicted on Count One, apparently has not appealed from her sentence of 5 years probation.

Abraham was sentenced to 15 and 4 year consecutive terms on Counts One and Three, and to a concurrent life term on Count Two. Grant and Holder were sentenced to 15 and 4 year consecutive terms on Counts One and Three. Brown was sentenced to 15 and 4 year concurrent terms on Counts One and Three. Ellington was sentenced to 8 and 4 year concurrent terms on Counts One and Three. Hoke and Sisca were sentenced to 15 year terms on Count One. Logan was sentenced to 5 and 3 year concurrent terms on Counts One and Three. McBride was sentenced to 5 and 4 year concurrent terms on Counts One and Three. All appellants were sentenced to special parole terms following their release from prison.

All appellanets have been enlarged on bail pending appeal, except Grant who is in state custody and Abraham as to whom bail was denied.

volving hard narcotics in violation of 21 U.S.C. § 848 (1970) (Count Two).

Of the numerous claims of error raised on appeal, we find the following to be the principal ones: (1) McBride, Hoke, Ellington, Brown and Sisca challenge the sufficiency of the evidence as to them; (2) Grant, Logan, Hoke, Holder and Abraham claim that there was a material variance between the single conspiracy charged and the multiple conspiracies said to have been proven; (3) Abraham challenges the constitutionality of the continuing criminal enterprise statute on its face and as applied to him; and (4) all appellants claim that the government's failure adequately to minimize its electronic surveillance requires total suppression of the wiretap evidence and its fruits, and they further claim that their deliberate refusal to move to suppress on that ground prior to trial did not constitute a waiver of their constitutional right to do so thereafter. Other subordinate claims of error are also raised.

We affirm.

I. Facts

(A) *Overall Enterprise*

The evidence, derived largely from wiretaps and their fruits, established that appellants and others were wholesale and major retail operatives in a large scale, vertically integrated heroin and cocaine[2] distribution network embracing Westchester County, New York City and New Jersey. Sisca and one Benjamin Castalozzo were the top links between unknown sources and this $5,000,000 a year corporate-like criminal enterprise which distributed 200

[2] The indictment refers to Schedule I and II controlled substances. 21 U.S.C. §812 (1970). The evidence established that for the most part heroin was involved, and to a lesser extent cocaine.

kilograms of heroin annually. Its day to day operations were directed by Abraham. He controlled the wholesale distribution activities of Hoke, Logan, Grant, Brown, Ellington and Holder, among others. Further down the marketing chain and somewhat closer to the retail level, Holder [3] was the proprietor of a heroin cutting and packaging "mill" where he and his wife, Carol, employed five "mill girls" who adulterated and repackaged the heroin for delivery by Ellington to their customers, one of whom was McBride.

(B) *Electronic Surveillance*

In view of the district court's clear and detailed statement of the facts with respect to the electronic surveillance here involved during the period from September 28 to December 15, 1971, 361 F. Supp. 735, it is sufficient for our purpose merely to summarize briefly those facts necessary to an understanding of our rulings on this issue.

On September 27, the Westchester County District Attorney's Office applied to Judge Timothy Sullivan of the Westchester County Court for an order authorizing a tap of the telephone listed in the name of Carol Holder and located at the Holder residence in Yonkers (the Holder tap). The order was issued the same day. It included, as did the others here involved, a clearly adequate "minimization" provision.[4]

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[3] Unless otherwise indicated, reference in this opinion is to appellant Erroll Holder. When we refer to his wife, Carol, we shall so state.

[4] N.Y. Criminal Procedure Law § 7 30(7) (McKinney 1971) requires that an eavesdropping warra: contain a provision to assure that the interception

> "be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping . . . . "

Appendix A

The tap was installed on September 28 and continued, pursuant to a court ordered extension, through November 24. The interception terminus (plant) was equipped to record both in-coming and out-going calls and to register the telephone numbers of calls made from the Holder phone. Investigators from the Westchester County Sheriff's office attended the plant twelve to sixteen hours a day. Nevertheless, the recording and registering devices at all times were maintained on an automatic setting and were activated each time the telephone receiver was lifted from its cradle. As a result, each call made to or from the Holder phone during the interception period was recorded or overheard, or both. Logs and transcripts of all calls were made.

Relying primarily on information gathered from the Holder tap, the Bronx County Attorney's office on November 8 applied for and obtained from Justice William Kappelman of the Bronx County Supreme Court an order authorizing a tap of the telephone listed in the name of Margaret Logan and located at the Co-Op City apartment (the Logan tap). This tap was directed principally at uncovering the narcotics related activities of Logan's boyfriend, Abraham. The tap was maintained until December 15, the date of Logan's arrest.

Except for the around the clock monitoring, the Logan tap was conducted in a manner essentially the same as the Holder tap. Each call was automatically recorded and a log was prepared for each reel of tape.

Also on November 8, Justice Kappelman authorized a tap of the telephone listed in the name of Lavern McBride (the McBride tap). As with the Logan tap, the McBride tap was attended 24 hours a day. With one exception, all calls were monitored, recorded, logged and in some cases summarized.

Appendix A

(C) *The Conspiracy*

Evidence derived from the three court authorized wiretaps, coupled with visual surveillance, disclosed a vast chain-type narcotics distribution conspiracy. The following summary reflects no more than the tip of the iceberg.

Shortly after the Holder tap was installed on September 28, Holder was overheard discussing a ransom of $14,000 and "you know—something else", that "thing", "junk merchandise", which had been paid for the return of his kidnapped partner, one Theodore Johnson. Holder also was overheard arranging for precautions to be taken by his "women" in the event they were threatened with kidnapping. The "women" later were identified as Holder's wife, Carol, and the five "mill girls" who operated the narcotics cutting and packaging facility.

At periodic intervals beginning in early October, the Holders were overheard planning a rendezvous with their mill girls. After several unsuccessful attempts, surveillance teams on November 24 finally managed to follow Carol Holder and the five mill girls to their meeting place on Convent Avenue in Manhattan. Armed with a search warrant, the agents raided the apartment in the early morning hours of November 24. They uncovered a narcotics mill in full operation. They found Carol Holder and the girls literally in the midst of packing thousands upon thousands of heroin filled glassine envelopes for retail street sale.[5]

This raid put a serious crimp in the overall Holder operation. Within two days, McBride was overheard telling a would-be narcotics purchaser that the Holder cupboard was bare. She said, "If Fox (Holder) is out—everybody's out."

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[5] Later the same day, the Holder residence (to be distinguished from the Convent Avenue apartment) was searched pursuant to a warrant. A large amount of cash was found hidden in a raised sleeping platform in the bedroom.

Appendix A

Conversations intercepted on the Holder tap in early November also disclosed the relationship between Abraham, Holder and the latter's courier, Ellington, in the hierarchy for the distribution of heroin. On November 8, at 2:35 P.M., for example, Abraham called Holder and said that he had good news, "Tonight". Ten minutes later and again that evening, Holder called Ellington and directed him to be prepared for a night-time delivery. At 9:43 P.M. the same evening, Abraham called Holder again and said that, although "they didn't give me as many as they were supposed to", Holder ought to send "that boy over". Holder immediately called Ellington and ordered him to "go downtown wtih it, you know what I'm talking about."

While most of Holder's conversations were guarded and obtuse, their import was clear to those engaged in the business. On one occasion a disgruntled customer called Holder and complained that he had received only four rather than the promised ten ounces on his last narcotics purchase: "Listen Fox. That was four (4) on the scale and four (4) by spoon count. Anyway you weigh it . . . Ya hear me." Holder agreed to "make up the difference" or "give . . . back the scratch".

Interceptions on the Logan tap also indicated Abraham's role as the director of the other appellants. Logan, Abraham's surrogate, frequently was overheard taking messages and orders and planning to attend meetings in Abraham's absence. Grant was at Abraham's beck and call. On one occasion Grant was told by Abraham where and when to meet one who wanted "to buy you know". At other times Grant appeared at Logan's apartment as directed by Abraham. Brown's role as an outlet for Abraham's merchandise also was clearly indicated.

The Logan tap further revealed the roles of Sisca and Castalozzo as the suppliers of narcotics to Abraham. Both were overheard at various times arranging meetings with

Abraham or, in his absence, with Logan. On December 13, surveillance agents for the first time were able to follow Abraham to the meeting place and to observe him in his car conversing with Sisca at the appointed hour. Shortly after the meeting began, Castalozzo, who had been serving as a look-out, apparently noticed the surveillance. Immediately upon his warning, "This car is dirty . . . Come on", Sisca got out of Abraham's car. He and Castalozzo got into another nearby car and, after driving slowly for several blocks, sped away from the pursuing officers in a "French Connection"-like flight between the pillars of an elevated subway.

Beginning with this abortive December 13 meeting between Sisca and Abraham, there was frenetic activity on the part of the co-conspirators as the police investigation approached a culmination. Such activity included a call from the agitated Castalozzo to Logan to arrange another rendezvous with Abraham, a December 14 call from Abraham to Brown directing the latter to be prepared for a delivery the next morning and a noontime meeting between Grant, Logan and Hoke on December 14.

On the following morning, December 15, Abraham, Logan, Grant and others were observed at various times entering the Hoke residence on Olmstead Avenue in the Bronx. Grant entered carrying a collapsed valise. Abraham and Logan each had empty shopping bags. After brief stays, Hoke's visitors left with their containers full. Surveillance teams followed the suspects to different locations and arrested them. The containers which each had carried from the Hoke residence were searched and found to contain large amounts of heroin. When Abraham was arrested after a high speed chase, he admitted that over a period of two and a half years he had purchased bi-weekly and redistributed approximately 200 kilograms of heroin annually.

Later that day, Hoke was arrested upon leaving his house. A search of his house pursuant to a warrant pro-

duced large amounts of heroin, cash, narcotics packaging paraphernalia, a rifle and several revolvers.

On the evening of December 15, Grant's home and the apartments of Logan and McBride were searched pursuant to warrants. An immense quantity of narcotic adulterants was found in Grant's basement. A complete narcotics cutting mill, quantities of both heroin and cocaine, and a revolver were found in McBride's apartment. While examining a sleeping platform in Logan's apartment, an officer raised a loose section of the platform's carpeting and discovered what appeared to be the organization's current accounting record.[6]

II. Sufficiency of the Evidence

McBride, Hoke, Ellington, Brown and Sisca claim that the evidence was insufficient to support the jury's verdicts. Viewing the evidence in the light most favorable to the government, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2 Cir. 1972), we hold that each of these claims is without merit.

(A) *McBride*

A search of McBride's apartment on the evening of December 15 uncovered a complete narcotics cutting mill. Her participation in the conspiracy was clearly established

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[6] This record indicated the following shares:

		Pay	Balance
"Walter [Grant]	22,000	10,000	12,000
Fox [Holder]	5,000		
Bobby [Hoke]	5,000		
Bill [Brown]	13,000		
Sandy	25,000"		

The last entry referred to a deceased co-conspirator, Melvin Coombs, and his girlfriend, Cassandra Sullivan.

in an intercepted call shortly after November 24 when she identified the "Fox" (Holder) as her narcotics supplier and stated, "If Fox is out—everybody's out." [7]

(B) *Hoke*

Hoke claims that he was in an inebriated stupor and therefore was completely unaware of what went on at his home on the morning of December 15. In the alternative, he claims that the evidence of his meeting with Logan and Abraham on December 14, coupled with that indicating that his *entire house* [8] was a "stash" for a narcotics distribution enterprise, permits at most an inference of his knowledge of but not his active participation in the conspiracy. We reject both claims.

While evidence of mere attendance at a meeting or knowledge of a conspiratorial act, without more, may not be sufficient to support an inference of active participation in a conspiracy, *United States* v. *Stewart*, 451 F.2d 1203 (2 Cir. 1971); *United States* v. *Kearse*, 444 F.2d 62 (2 Cir. 1971), here there was far more. The government does not rely on Hoke's mere presence at the premises where contraband was found, as in *Kearse;* nor was his involvement as

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[7] We reject out of hand McBride's contention that there was insufficient non-hearsay evidence to warrant the admission against her of co-conspirators' statements identifying Holder as the "Fox". Her own intercepted admission that she was out of heroin, coupled with her arrest in constructive possession of heroin, clearly supported the court's preliminary determination of her participation in the conspiracy. *United States* v. *Geaney*, 417 F.2d 1116, 1119 (2 Cir.), *cert. denied*, 397 U.S. 1028 (1969).

[8] The search of Hoke's house uncovered the following: a quantity of heroin in plain view on the living room floor; an attache case containing $39,000 in the master bedroom closet; a revolver on the bed; scales and bagging equipment in the kitchen; an attache case containing $20,130 in the living room closet, together with several revolvers and a rifle nearby; and several thousand glassine envelopes in the basement garage.

limited as that of the chauffeur of a drug dealer in *Stewart*. Hoke was the owner, and shared with his wife exclusive possession, of a house found strewn with narcotics and various other paraphernalia of a heroin trafficking operation. This, coupled with his presence on the premises while others entered and left carrying containers of heroin, clearly permitted the inference that Hoke performed the critical role of maintaining the "stash" or "safe haven" for the distribution operation. *United States* v. *Terrell*, 474 F.2d 872, 875 (2 Cir. 1973); cf. *Evans* v. *United States*, 257 F.2d 121, 128 (9 Cir.), *cert. denied*, 358 U.S. 866 (1958). Further, the suggestion that members of a conspiracy would entrust $60,000 in cash and a large quantity of narcotics to one who was not a full partner strains credulity. *United States* v. *Terrell, supra*, 474 F.2d at 875. Finally, when considered in conjunction with other evidence, *United States* v. *Cassino*, 467 F.2d 610, 618 n. 21 (2 Cir. 1972), the entire "Bobby 5,000" on the accounting record found at the Logan apartment surely permitted the inference that it referred to Hoke's share of the December 15 delivery.

(C) *Ellington*

While there was no evidence that Ellington had narcotics in his possession during the period of the conspiracy, there were eight intercepted telephone conversations on the basis of which the jury was warranted in finding that Ellington had an established role in the Holder-Abraham operation. For example, on that occasion referred to above after Ellington was directed by Holder to "go downtown with it, you know what I'm talking about", Ellington did so. The next day he reported back to Holder that "Purcell . . . gave me a grand" but "he wants something tomorrow morning". Ellington also informed Holder that another individual, Bruce, was "happy to get it last night."

Appendix A

This repeated though guarded use of cryptic expressions by members of a narcotics conspiracy has been aptly described as a "narcotics code". *United States* v. *Manfredi*, —— F.2d ——, —— (2 Cir. 1973), slip op. 5593, 5608 (November 23, 1973). The use of such expressions in the context of the entire record in the instant case, including the conversations between Holder and Ellington, was sufficient to permit the jury to find that Ellington was an active participant in the conspiracy.

(D) *Brown*

There was evidence that on at least three occasions in the fall of 1971 Brown and Abraham agreed over the telephone to meet and then did meet at the "same place" to transfer drugs and money when they were "ready for" each other.

On one such occasion, on November 16, Brown drove from New Jersey to a deserted street in Manhattan, surreptitiously removed an attache case from the trunk of his car and handed it to Abraham who immediately locked it in the trunk of his car. Two days later Brown called Abraham and expressed disappointment upon learning that "nothing [was] happening" and that "everything [was] quiet." The jury could well have inferred from this that Brown's disappointment was directed at Abraham's failure to deliver narcotics for which he had been paid two days earlier.

Even more damaging was the evidence that on December 14, within a few hours of the Hoke distribution, Abraham called Brown and advised him that "I'll see you tomorrow at 12." At 11:40 A.M. the next day, Abraham left the Hoke residence with a shopping bag full of heroin. Had it not been for his unexpected arrest, Abraham would have been able to keep his appointment with Brown.

This evidence, together with a great deal more, such as the accounting record showing "Bill 13,000", was more than sufficient to permit the jury to find that Brown was not only a regular customer of Abraham but also the intended recipient of the heroin carried by Abraham at the time of his arrest.

(E) *Sisca*

The government adduced evidence that Sisca and Castalozzo were the top echelon links between unknown sources of supply and the narcotics distribution enterprise here involved. The principal evidence of Sisca's participation in the conspiracy were eight intercepted telephone conversations with Abraham, Castalozzo and Logan, and his presence at, and flight from, a furtive, night-time meeting with Abraham on December 13.[9]

During one of these conversations—the last intercepted before the aborted December 13 meeting between Sisca, Castalozzo and Abraham—Sisca was overheard telling Abraham that the "balance" of the "thing" was available for delivery. While such talk in other context would hardly be incriminating on its face, what we have said above regarding the sufficiency of the evidence against Ellington applies with equal force here. The repeated use

[9] We reject Sisca's contention that because he was acquitted on the count charging illegal use of the telephone, we may not properly consider the substance of intercepted telephone conversations in weighing the sufficiency of the evidence against him on the conspiracy count. Cf. *United States* v. *Carbone*, 378 F.2d 420 (2 Cir.), *cert. denied*, 389 U.S. 914 (1967).

Sisca's contentions and offers of proof with respect to electronic and visual identification inadequacies were properly addressed to the jury which rejected them.

of such cryptic phrases in conversations with other members of the conspiracy,[10] many of whom were apprehended in possession of narcotics, was sufficient to permit the jury to find that Sisca was an active participant in the conspiracy. *United States* v. *Manfredi, supra.*

Moreover, it is highly significant that this last intercepted call and the aborted meeting which followed pursuant to the call took place within a day of the Hoke distribution when Abraham received a large quantity of heroin. In this context, the jury was warranted in finding that the "balance" of the "thing" were the eight kilograms of heroin which were seized on the morning of December 15. This is buttressed by Sisca's flight in response to Castalozzo's warning, "This car is dirty." If this remark meant, as might reasonably have been inferred, that the "balance" referred to narcotics being at the scene, then the jury was entitled to view Sisca's precipitous flight as evidence of consciousness of guilt. *United States* v. *Christophe,* 470 F.2d 865, 869-70 (2 Cir. 1972), *cert. denied,* 411 U.S. 964 (1973).

III. Single Conspiracy

Grant, Logan, Hoke, Holder and Abraham claim that the evidence established four separate conspiracies of the "hub-spoke" type rather than the single "chain" type conspiracy charged in the indictment. This claim is no stranger to this Court. See, e.g., *United States* v. *Vega,* 458 F.2d 1234, 1236 (2 Cir. 1972), *cert. denied,* 410 U.S. 982 (1973); *United States* v. *Borelli,* 336 F.2d 376, 382-87 (2 Cir. 1963), *cert. denied,* 379 U.S. 960 (1965); see also

[10] Other members of the conspiracy regularly used such obtuse but, in the context of this record, narcotics related phrases as "that thing" (Holder), "one" (Abraham), "something" (Brown, Ellington), "it" (Ellington, "the same thing" (Grant, Brown).

Kotteakos v. *United States*, 328 U.S. 750, 773-74 (1946). These appellants also claim that the court failed adequately to instruct the jury that it must find a single conspiracy and not multiple conspiracies. We hold that each of these claims is without merit.

The evidence was sufficient to permit the jury to find that each appellant played a well defined role in a highly structured, disciplined and vertically integrated criminal enterprise, and that the "part with which [each] was immediately concerned, was dependent upon the success of the whole." *United States* v. *Tramaglino*, 197 F.2d 928, 930 (2 Cir.), *cert. denied*, 344 U.S. 864 (1952), quoting from *United States* v. *Bruno*, 105 F.2d 921, 922 (2 Cir.), *rev'd on other grounds*, 302 U.S. 287 (1939); see also *United States* v. *Bynum*, 485 F.2d 490, 495-96 (2 Cir. 1973). Intercepted telephone conversations and visual surveillance clearly established the necessary links between all appellants and their continuous involvement with each other. *United States* v. *Calabro*, 449 F.2d 885, 892-93 (2 Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). The fact that not each of the conspirators was acquainted with each of the others is of no significance. It is sufficient for the government to have proven, as it did here, that "each knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business." *United States* v. *Bynum*, *supra*, 485 F.2d at 496; *United States* v. *Calabro*, 467 F.2d 973, 982-83 (2 Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

We also hold that Judge Bryan's charge on this issue was clearly appropriate—indeed, if anything, more favorable to appellants than that to which they were entitled. He properly marshalled the evidence, explained in detail the essential elements of the crime of conspiracy and made it crystal clear that, before appellants could be convicted, the jury was required to find "the single conspiracy charged."

Appendix A

IV. Continuing Criminal Enterprise

Abraham's claim that the continuing criminal enterprise provision of 21 U.S.C. § 848 (1970) on its face is void for vagueness is foreclosed by our decision in *United States v. Manfredi, supra,* —— F.2d at ——, slip op. at 5619-21, where the same claim was rejected. We also reject Abraham's claims that the statute is unconstitutional as applied to him or, in the alternative, that the evidence was insufficient to sustain his conviction under that statute.

To establish a violation of Section 848, the government was required to prove that Abraham occupied a position as organizer or a managerial or supervisory position with respect to a continuing narcotics trafficking operation in concert with five or more other persons, and that he derived substantial income or resources from the operation. The evidence was more than sufficient to bring Abraham squarely within the statute.

It is beyond dispute that Abraham was the operational kingpin of a highly organized, structured and on-going narcotics distribution network. Electronic and visual surveillance provided impressive documentation of a continuing distribution relationship between Abraham as a major wholesale supplier and such lower level wholesale and major retail operatives as Logan, Brown, Grant, Hoke, Coombs and Holder and, through the latter, with Carol Holder, Ellington and McBride. Evidence of a similar high degree of trustworthiness established Abraham's responsibility for and direct control over those working under his supervision. In fact, Abraham's own admissions corroborate other evidence of his supervisory position in the organization. After his arrest on December 15, he admitted that he had purchased that morning heroin worth more than $170,000, and that he had been making large

purchases and subsequent redistributions on a bi-weekly basis for a period of some two and one half years.[11]

In the teeth of this evidence, Abraham nevertheless contends that the government failed to prove that he had gained substantial economic benefit from his distribution activities. He says that his December 15 purchase was on "consignment" and that he was $170,000 in debt at the time. This contention is fatuous, to put it charitably. In the first place, we reject any notion that a consignment debt necessarily suggests an operational deficit. On the contrary in the context of this record, it indicates a substantial anticipated profit. Secondly, in view of his position in the distribution network, the enormous quantity of narcotics involved (over 200 kilograms annually) and the substantial sums of money changing hands ($5,000,000 annually), the jury surely was justified in finding that Abraham derived substantial income from this immensely profitable narcotics enterprise.

V. Minimization

All appellants claim that the electronic surveillance from which most of the evidence was derived failed to comply with the minimization requirements of state and federal law. N.Y. Criminal Procedure Law § 700.30(7) (McKinney 1971); 18 U.S.C. § 2518(5) (1970). They claim that the appropriate remedy for such a failure is the total suppression of the wiretap interceptions and their fruits. They

[11] Assuming arguendo that it was error to have permitted the jury to consider Abrahams admissions with respect to drug transactions that occurred prior to the May 1, 1971 effective date of Section 848, we hold that such error was harmless beyond a reasonable doubt. The proof that Abraham was engaged in bi-weekly narcotics transactions for one and a half years clearly was sufficient to satisfy the "continuing series of violations" requirement of that section.

rely upon *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md.), *aff'd on other grounds sub nom. United States* v. *Giordano*, 469 F.2d 522 (4 Cir. 1972), *cert. granted*, 411 U.S. 905 (1973); but see *United States* v. *Cox*, 462 F.2d 1293 (8 Cir. 1972).

We decline to rule on the merits of either of these claims.[12] We hold, as did the district court below at trial and after a post-trial hearing, that appellants knowingly and intentionally waived their rights to challenge the admissibility of the wiretap evidence in that they deliberately failed to raise the claim of failure to minimize in a pretrial motion although specifically directed to do so.

The statutory requirement of a *pretrial motion to suppress* wiretap evidence is set forth in 18 U.S.C. § 2518(10)(a) (1970) which provides in pertinent part:

> "Such motion [to suppress the contents of any intercepted wire . . . communication, or evidence derived therefrom] *shall* be made before the trial . . . unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." (emphasis added)

It is undisputed that no pretrial motion on the ground of failure to minimize was made here. This does not end the inquiry. The question remains whether appellants' failure to make such pretrial motion can be justified by either of the statutory exceptions to what otherwise appears to be the absolute time requirement of Section 2518(10)(a). We hold that their failure was not justified.

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[12] In view of the ground of our decision, we need not decide whether the appropriate *remedy* for inadequate minimization of a state wiretap, as opposed to whether there was adequate minimization, is a question of state or federal law. See *United States* v. *Manfredi*, *supra*, — F.2d — n. 7, slip op. at 5610 n. 7.

Appendix A

On November 8, 1972, a few weeks after the return of the indictments and almost two months before the original trial date, the government formally advised appellants that "all tapes of conversations electronically recorded under Court order" would be made available for inspection and copying. Shortly thereafter, the government provided appellants with a voluminous amount of material relating to the interceptions, including the wiretap orders, the supporting papers and a complete log of the Holder tap. Facilities for listening to and copying the interceptions were provided. By late December, appellants' tape evaluation process was well under way.

On December 27, Judge Bryan held a pretrial conference to consider, among other matters, appellants' request for an adjournment of the trial which was then scheduled to begin January 3. The transcript of that conference clearly shows that appellants were well aware of the factual basis for a failure to minimize claim if they had intended as a matter of trial strategy to assert such a claim. In stressing the need for additional time to consider and evaluate the tapes, counsel for Sisca, Abraham, Grant, Logan, Hoke and Holder (this counsel was acting for other appellants as well) made the following statement about the 200 hours of recordings which had already been analyzed:

> "We also discovered to our chagrin that the agents and the police who executed the warrants did not follow the directives in the warrants, did not follow the directives of federal law, and that is minimization."

In direct response to this statement, Judge Bryan said.[13]

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[13] By this time, Judge Bryan had ruled upon motions to suppress the wiretap evidence from the Holder, Logan and McBride interceptions. These motions were made on a variety of grounds. No such motion, however, had claimed the failure to minimize.

Appendix A

> "Now, if, for example, you have any affirmative evidence which you claim presently justifies the suppression of anything, any of the taped materials, it seems to me quite clear that that ought to be raised forthwith."

Despite this clear directive, appellants chose not to avail themselves of the opportunity provided by the court to move to suppress on the ground of alleged failure to minimize.

On December 29, Judge Bryan held another pretrial conference. This time he agreed to postpone the trial until January 15. He did so because defense counsel desired further time to continue listening to the tapes on the minimization and other questions. No minimization motions were filed during the ensuing two and a half weeks before the trial began.

Indeed, not until January 23, five days after the trial began, when the government sought for the first time to introduce evidence derived from the Logan tap, did defense counsel find it "appropriate" formally to raise the minimization issue. Judge Bryan denied this motion, and similar ones made during trial, on the ground that they were not timely. After trial, the judge held an evidentiary hearing on appellants' minimization claims. He denied the motions to suppress in all respects—"both on the ground that defendants waived their right to make such motions and on the merits." 361 F. Supp. at 748.

We affirm the district court's denial of the motions to suppress, but we do so on the ground that appellants waived their right to challenge the admissibility of the wiretap evidence by deliberately refusing to raise the failure to minimize claim in a pretrial motion. Appellants knew of the alleged failure to minimize at least three weeks prior to trial. Indeed, they themselves brought to the attention of the court the facts upon which such a

motion could have been made, had their trial strategy called for it. Despite a clear direction from the court, however, they made no pretrial minimization motion. We hold upon this record that appellants' conduct squarely violated the time requirement of Section 2518(10)(a) and was not justified by either of its exceptions.

Appellants argue, however, that, having put the court "on notice" with respect to their minimization claim prior to trial, they cannot be said to have waived an important constitutional right simply by having postponed their formal motions until trial. They assert that the attitude of the judge, in finding a waiver under these circumstances "is characteristic of a prosecutorial mentality rather than a judicial mentality." We emphatically disagree.

We recently have emphasized the importance of having suppression motions made and, where possible, determined prior to trial. *United States* v. *Tortorello*, 480 F.2d 764, 785 n. 18 (2 Cir. 1973), *cert. denied*, 414 U.S. 866 (1973); cf. *United States* v. *McCall*, —— F.2d ——, —— (2 Cir. 1973), slip op. 523, 529 (November 27, 1973). Moreover, Congress intended strict adherence to this policy with respect to motions pursuant to Section 2518(10)(a). The Report of the Senate Judiciary Committee[14] on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. (1970), of which Section 2518(10)(a) is a part, made it clear that this provision was intended to limit the evidentiary sanction of exclusion provided in Section 2515:

> "[Section 2518(10)(a)] must be read in connection with sections 2515 and 2517, . . . which it *limits*. . . . The motion *must* be made before the trial, hearing, or proceeding unless there is no opportunity to make the motion or the person was not aware of the grounds

[14] S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), quoted in 2 U.S. Code Cong. & Adm. News 2195 (1968).

> of the motion . . . . Care must be exercised to avoid having a defendant defeat [the government's] right of appeal . . . , by waiting until trial." (emphasis added.)

Appellants argue, however, that Congress was mistaken and that an intentional and unjustifiable failure to make a timely suppression motion does not jeopardize the government's right to appeal pursuant to Section 2518(10)(b). Constitutional issues aside, see *United States* v. *Birrell*, 470 F.2d 113, 115 n. 2 (2 Cir. 1972), Congress clearly intended to permit the government to appeal only from an *adverse* ruling on a *properly* made suppression motion. Here, appellants' motions to suppress were improperly made because they were untimely. We reject appellants' suggestion that Congress intended the incongruous result of an appeal from a ruling on a suppression motion which, as here, would have been time barred by Section 2518 (10)(a).

Moreover, the potential loss of its right to appeal is not the only prejudice suffered by the government when a suppression motion is inexcusably delayed until trial. An adverse ruling on a pretrial motion will permit the government to change the theory of its case, to develop or place greater reliance upon untainted evidence or otherwise to modify its trial strategy. When the deliberate trial

strategy of defense counsel is to obtain such a ruling only during or after trial, this flexibility obviously is lost.[15]

Perhaps of chief importance, the timely disposition of such motions is critical to the orderly and fair administration of the criminal justice system itself. We will not countenance such deliberate and subtly disruptive tactics as those employed here. They would unnecessarily obfuscate the issues, confuse the jury and otherwise interfere with the judicial process. See *United States* v. *Bennett*, 409 F.2d 888, 901 (2 Cir. 1969), *cert. denied*, 396 U.S. 852 (1970). Cf. *Nardone* v. *United States*, 308 U.S. 338, 341-42 (1939).

It is well settled that unjustified failure to make a timely motion to suppress evidence pursuant to former Fed. R.

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[15] Appellants contend that the government could not possibly have been prejudiced here because its entire case was derived from wiretap evidence and its fruits. Such reasoning is unpersuasive for several reasons. First, it is not at all clear which of the appellants would have had standing to challenge the various alleged minimization inadequacies. Thus, even if the failure to minimize were to require total suppression of the wiretap evidence—an issue upon which we are not required to rule—certain wiretap evidence might very well have been admissible against certain of the appellants. See *United States* v. *Poeta*, 455 F.2d 117, 122 (2 Cir. 1972). Secondly, we do not know whether the government had clearly untainted evidence which, because of appellants' failure to make timely motions to suppress on minimization grounds or for strategic reasons, the government had no occasion to introduce.

Crim. P. 41(e) (now Rules 41(f) and 12), the provisions of which are analogous to Section 2518(10)(a), constitutes a waiver of that right. *United States* v. *Ellis*, 461 F.2d 962, 969 (2 Cir.), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *Blackwood*, 456 F.2d 526, 529 (2 Cir.), *cert. denied*, 409 U.S. 863 (1972); *United States* v. *Bennett*, *supra*, 409 F.2d at 901; *United States* v. *Weldon*, 384 F.2d 772, 775 (2 Cir. 1967). This is so even when the district court, as here, considers the merits of the suppression motion as well as its timeliness. *United States* v. *Nicholas*, 319 F.2d 697 (2 Cir.), *cert. denied*, 375 U.S. 933 (1963); *United States* v. *Volkell*, 251 F.2d 333, 336 (2 Cir.), *cert. denied*, 356 U.S. 962 (1958). This rationale controls here.

Finally, we reject, as did the district court, appellants' contention that the finding of waiver here is inconsistent with the view that courts should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). We hold that appellants, by ignoring the district court's explicit directive to make their minimization motions before trial, elected to pursue a trial strategy of intentional relinquishment of a known right and the deliberate by-pass of the orderly and timely suppression procedure provided by Section 2518(10(a). In doing so, they waived their right thereafter to challenge the admissibility of the wiretap evidence. Cf. *Kaufman* v. *United States*,

394 U.S. 217, 227 n. 8 (1970); *Henry* v. *Mississippi*, 379 U.S. 443, 450-51 (1965); *Fay* v. *Noia*, 372 U.S. 391, 438-39 (1963).

We have considered appellants' other claims of error and find them without merit.

Appellants were convicted more than a year ago after a fair trial on the basis of overwhelming evidence of serious crimes committed more than two and a half years ago. We order that the mandate issue forthwith.

Affirmed.

APPENDIX B

UNITED STATES OF AMERICA,

v.

ALPHONSE SISCA et al., Defendants.

No. 72 Cr. 1159.

United States District Court

June 25, 1973.

Whitney North Seymour, Jr., U. S. Atty., by W. Cullen MacDonald, Asst. U. S. Atty., for the Government.

Lenefsky, Gallina, Mass, Berne & Hoffman, New York City, for defendants Sisca, Abraham, Grant, Logan, Hoke and E. Holder; Gino E. Gallina, Robert H. Kiernan, New York City, of counsel.

Edward Gasthalter, New York City, for defendant Brown.

Robert P. Leighton, New York City, for defendant Ellington.

Alvin Geller, New York City, for defendant C. Holder.

Gilbert Epstein, New York City, for defendant McBride.

OPINION

FREDERICK VAN PELT BRYAN, District Judge:

At the conclusion of a six-week trial before me, the jury returned the following verdicts:

As to defendants Grant, E. Holder, Brown, Ellington, Logan, McBride and C. Holder, guilty of (1) conspiracy to

violate the narcotics laws, 21 U.S.C. Section 846, and (2) the use of a telephone to further such violations, 21 U.S.C. Section 843(b).

As to defendant Abraham, guilty of (1) conspiracy to violate the narcotics laws; (2) use of a telephone to further such violations and (3) continuous dealings in narcotics in concert with 5 or more other persons as to whom he acted as organizer, manager or supervisor, 21 U.S.C. Section 848.

As to defendant Sisca, (1) guilty of conspiracy to violate the narcotics laws and (2) not guilty of the use of the telephone to further such violations.

As to defendant Hoke, guilty of conspiracy to violate the narcotics laws.[1]

During the course of the trial tapes of 21 conversations carried on over the telephone listed in the name of defendant Carol Holder, 20 conversations over the telephone listed in the name of defendant Margaret Logan, and one conversation on the telephone listed in the name of defendant Lavern McBride were introduced in evidence by the prosecution and played before the jury. These conversations had been intercepted pursuant to wiretap orders issued by a Judge of the County Court of Westchester County in the case of the Holder tap, and by a Justice of the New York Supreme Court, Bronx County, in the case of the Logan and McBride taps. The intercepted communications in evidence were a significant part of the prosecution's case.

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[1] A verdict of acquittal was directed by the Court on counts of narcotics conspiracy and use of a telephone to further the conspiracy, against defendants Johnson, Hartley, Bazemore and Sullivan; and on the count of unlawful use of a telephone against defendant Hoke. Counts against defendant Cleo Dingle were severed. Defendants Castalozzo, Sizemore and Owens were fugitives and were not tried.

Appendix B

The Jury was selected and sworn on January 16, 1973. On January 24, 1973, well after the taking of testimony was under way, counsel representing Errol Holder moved for the first time to suppress all conversations intercepted over the Holder telephone upon the ground of a claimed "failure to minimize the interception of communications not otherwise subject to interception." Thereafter, similar motions were made with respect to conversations intercepted under the Logan and McBride wiretaps. These motions were joined in by all defendants who had participated in the various conversations admitted in evidence. A hearing was requested as to the facts of minimization.

The Government opposed the motions, both on the ground that they were made too late and the defendants had waived their rights to make them, and on the merits. Decision was reserved until the conclusion of the trial. After the jury had returned its verdict, evidentiary hearings were held to determine such facts with respect to the minimization claims as had not been brought out during the trial and thus to complete the record on the subject. The motions to suppress are now before me for decision.

The interception of wire communications and authorizations therefor are governed by Chapter 119 of Title 18 U.S. Code. Section 2518(5) of that chapter provides that every order for interception of a wire communication

> shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.
> . . .

The New York Criminal Procedure Law, which "virtually tracks the language" of Chapter 119,[2] contains a provision to the same effect. New York Criminal Procedure Law § 700.30(7).

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[2] United States v. Tortorello, 480 F.2d 764, 772 (2d Cir. 1973).

Appendix B

The wiretap orders issued in this case contained such provision.[3] The moving defendants contend that these provisions of the interception orders were not complied with and that the intercepted conversations should therefore be suppressed.

The evidence adduced at the trial established a widespread and complicated conspiracy among the defendants and others to distribute heroin and cocaine on a large scale. The conspiracy was a narcotics distribution operation by which drugs were obtained from major wholesalers and passed on to retailers for retail sale. Operations were largely in Manhattan, the Bronx and southern Westchester. The evidence primarily concerned operations over a period from mid-August to mid-December, 1971.

Heroin in quantities as large as 8 kilograms (at $26,000 per kilo) were purchased periodically from major wholesalers by defendant Abraham, who appears to have been the key man and organizer of the operation. The other conspirators played various roles, as links with wholesalers, distributors, supervisors or participants in cutting mill operations, couriers and contact people.

Lengthy and intensive investigation by law enforcement officers, both state and federal, established the connections between the co-conspirators, numerous meetings and arrangements between them in furtherance of the conspiracy, and its objectives and its method of operation. The investigation resulted in the seizure, pursuant to search warrant, of large quantities of narcotic drugs, adulterants, dilutants, packaging materials and paraphernalia, cash, data concerning financial transactions, and weapons, in apartments and houses occupied by various of the defendants; a raid pur-

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[3] While the original McBride order, issued Nov. 8, 1971, contained such a requirement, the modified order, issued Nov. 17, 1971, did not. However, it can be considered to incorporate the minimization provision of the earlier order. *See* United States v. Bynum, 475 F.2d 832, 835 (2d Cir. 1973).

suant to search warrant on a cutting mill in full operation and the arrest of six women who were engaged in diluting and packaging heroin and cocaine for retail distribution, and the arrest of several defendants and co-conspirators, with large quantities of narcotics in their possession.

There are two issues presented here:

1. Did the defendants waive any rights to move to suppress the intercepted conversations for failure to minimize by not making such motions before trial?

2. Are the defendants or any of them [4] entitled to suppression of the intercepted conversations admitted in evidence for failure to comply with the minimization provisions of the statute and the wiretap orders?

I

18 U.S.C. § 2518(10)(a) mandates that a motion "to suppress the contents of any intercepted wire or oral communication . . . shall be made before the trial, hearing or proceeding, unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." [5] It cannot be disputed that no pretrial motion on the ground of failure to minimize was made in the case at bar.

The indictment in this case was filed on October 16, 1972. Defendants were arraigned on October 30, 1972. The case was then assigned to me and defendants were given the usual 10 days for motions, which was extended until November 21, 1972. Trial was initially set for January 3, 1973 but was postponed at the defendants' request until January 16, 1973. Some 8 pretrial conferences and hearings were held prior to trial, to dispose fully of pretrial motions and issues.

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[4] In view of the result reached here it is unnecessary to discuss the question of the standing of some of the defendants to make the motions.

[5] See also Rules 12 and 41(f), F.R.Cr.P.

Appendix B

On November 8, 1972 the Government advised the defendants in writing that, among other things, "all tapes of conversations electronically recorded under Court order" would be available to defendants for inspection and copying. Thereafter, a voluminous exhibit (Ex. 59 at trial), containing the wiretap orders involved on these motions and the papers supporting them together with the logs which had been made of the Holder tap, was served on the defendants by the Government. After some delay, counsel for defendants began the process of listening to the tapes and listened to a large sample of them.

Motions to suppress the Holder and Logan interceptions were filed on November 16, 1972 and to suppress the McBride interceptions on November 20 and December 7, 1972. These suppression motions were made on a variety of grounds, including lack of probable cause for the issuance of the wiretap orders. But there is not the slightest question that no claim was made, or even suggested, in the moving papers that there had been a failure to comply with minimization requirements or that this was a ground for suppression. These pretrial suppression motions were all denied by the Court on December 18, 1972.[6]

At a pretrial conference of December 27, 1972, held primarily to determine whether the trial, then set for January 3, 1973, should be adjourned at defendants' request, it was apparent that Mr. Gallina and his associates, representing defendants Sisca, Abraham, Logan, Hoke, E. Holder and Grant, and also acting in this regard for other defendants, had listened to a substantial portion of the tapes—more than enough, in fact, to have a good knowledge of what they contained. Defendants also had copies of the log of the Holder tap, contemporaneously made by officers who had monitored the interception, which were

[6] A pretrial motion to suppress tapes of conversations over another telephone was granted on the ground of lack of probable cause to support the wiretap order.

quite sufficient to indicate any basis there was for the failure of minimization claim. At this conference, Mr. Gallina stated that from the listening which had been done, "We also discovered, to our chagrin, that the agents of the police who executed the warrants did not follow the directives of the warrant, did not follow the directive of federal law and that is minimization."

The Court directed: "Now, if, for example, you have any affirmative evidence which you claim presently justifies the suppression of anything, any of the taped materials, it seems to me quite clear that it ought to be raised forthwith." (Minutes of Dec. 17, 1972, at 24-25).

The request for an adjournment was on the basis that defense counsel desired further time to continue listening to the tapes on the minimization and other questions. After a further pretrial conference on Dec. 29, 1972, the Court granted an adjournment of the trial to January 15, 1973, then two and a half weeks off.

Nevertheless, no minimization motions were made prior to the commencement of the trial.

It was not until January 23, five trial days after the trial had commenced and the jury had been selected and sworn, that defense counsel referred to minimization again. When testimony was being given as to the Logan tap, defendants for the first time sought discovery of the logs of this tap. Mr. Pollok, representing the defendant Errol Holder, stated that while the Holder logs indicated lack of minimization, he did not know about the Logan and McBride taps. The following exchange then took place:

> "The Court: You have every way of knowing. You have heard the tapes. What are you talking about?
>
> * * * * *
>
> Mr. MacDonald: The record should reflect, I believe that there has been no such motion based upon minimization in this case.

The Court: No. There has been none. There has been mention of it, but that is all.

Mr. Pollok: Your Honor, I was waiting for the appropriate time.

The Court: Well, the appropirate time was pretrial, and not now.

Mr. Pollok: I respectfully differ with your Honor." (Trial Tr. 749-50).

The next day, January 24, 1973, Mr. Pollok moved for the first time to suppress the Holder taps. Later in the trial motions to suppress the Logan and McBride taps were also made.

The motions made at trial are the only motions now before the Court. Thus, there can be no dispute that no motions whatsoever, raising the minimization question, were made before the trial started.

There remain the questions of whether or not there was "no opportunity to make such motion[s]" before trial or whether defendants "were not aware of the grounds of the motion[s]", 18 U.S.C. § 2518(10)(a).

I find that there was ample opportunity for defendants to make these minimization motions before trial. Defendants were fully aware of the grounds of such motions, as was conclusively demonstrated by their discussion of the issue in the pretrial conference of December 27, 1972 almost three weeks before the trial commenced and more than four weeks before the motions at trial were made.

[1] The time limitations prescribed in 18 U.S.C. § 2518(10)(a) for motions to suppress intercepted communications are no mere idle technical requirements. These limitations were imposed for sound policy reasons and should be enforced.

There is no need to stress the desirability and importance of having such motions made and determined prior to the commencement of the trial. Delay in making such motions until after the trial has commenced where, as here, the

necessary material on which to ground them was fully available to defendants in ample time to permit them to move, may have serious consequences. These consequences include long delay and interruptions in the course of the trial, the denial to the Government of an opportunity to determine what evidence it can or cannot adduce at the trial in the light of the court's pretrial rulings on such motions; whatever legal consequences in terms of the due process and double jeopardy clauses of the Constitution may result from the impanelment of the jury; and the serious question of whether the Government could appeal under Section 2518 (10)(b) from an order granting a motion to suppress after a jury was impanelled.

The report of the Senate Judiciary Committee on the Omnibus Crime Control Bill of 1968, S.Rep. No. 1097, which includes Section 2518, makes clear the importance placed by Congress on compliance wtih the pretrial requirements of § 2518(10)(a). Section 2518(9) requires the defendant to be furnished with copies of the court orders under which the interception was authorized not less than ten days before trial. Here defendants were furnished with such copies long before that. The report points out that "The 10-day period is designed to give the party an opportunity to make a pretrial motion to suppress under paragraph 10(a), discussed below." 2 U.S. Code Cong. & Admin. News, p. 2195 (1968). With respect to paragraph 10(a), the report states

> The motion must be made before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion, for example, when no notice was given under paragraph (9), discussed above. Care must be exercised to avoid having a defendant defeat the right of appeal under paragraph (b), discussed below, by waiting until trial. [Giacona v. United States, 257 F.2d 450 (5th), certiorari denied, 358 U.S. 873, 79 S. Ct. 113, 3 L.Ed.2d 104 (1958).]" 2 U.S. Code Cong. & Admin. News p. 2195.

[2] In the case at bar, all of the orders authorizing interception and the papers supporting them, all of the tapes of the intercepted conversations, and the complete logs of one of the interceptions were furnished or available to counsel for defendants almost two months before trial commenced. There was ample opportunity during the extensive discovery proceedings for the defendants to have obtained the logs of the other two tapes had they deemed them necessary. By December 27, 1972, almost three weeks before the trial, counsel for the defendants had already listened to some 200 hours of taped conversations and were fully aware of the minimization problem, as they indicated to the Court. The Court, having already denied a number of suppression motions on a variety of grounds, not including the lack of minimization, explictly directed that any further suppression motions should be made forthwith. Yet, whatever the reason, counsel chose not to make such motions pretrial but delayed making them until the trial was well under way. It is plain that defendants failed to comply with the requirements of § 2518(10)(a) and waived their right to make such motions after trial had commenced.

United States v. Bynum, 475 F.2d 832 (2d Cir. 1973), on which defendants rely on the waiver issue, is clearly distinguishable and does not affect this result. In *Bynum* a pretrial motion to suppress on the ground of failure to minimize was duly made. Here there was no pretrial motion on this ground.

Nor does the proposition in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) that courts should "'indulge every reasonable presumption against waiver' of fundamental constitutional rights" aid the defendants here. The cases in this circuit subsequent to Johnson v. Zerbst have consistently held that objections to unlawfully seized evidence are waived where counsel failed to make a pretrial motion to suppress as required by the comparable provisions of Rule 41 F.R.Cr.P. United States v. DiRe, 159 F.2d 818, 820 (2d Cir. 1947) (dictum), aff'd, 332 U.S. 581, 68 S.Ct.

222, 92 L.Ed. 210 (1948); United States v. Sansone, 231 F.2d 887, 891-892 (2d Cir.), cert. denied, 351 U.S. 987, 76 S.Ct. 1055, 100 L.Ed. 1500 (1956); United States v. Romero, 249 F.2d 371 (2d Cir. 1957); United States v. Montalvo, 271 F.2d 922, 926 (2d Cir. 1959), cert. denied, 361 U.S. 961, 80 S.Ct. 589, 4 L.Ed.2d 543 (1960); United States v. Di Donato, 301 F.2d 383, 384 (2d Cir.), cert. denied, 370 U.S. 917, 82 S.Ct. 1557, 8 L.Ed.2d 497 (1962); United States v. Watts, 319 F.2d 659 (2d Cir. 1963); United States v. Nicholas, 319 F.2d 697 (2d Cir.), cert. denied, 375 U.S. 933, 84 S.Ct. 337, 11 L.Ed.2d 265 (1963); United States v. Blackwood, 456 F.2d 526, 529 (2d Cir.), cert. denied, 409 U.S. 863, 93 S.Ct. 154, 34 L.Ed.2d 110 (1972). These holdings have renewed vitality in the light of Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), where the Court refused to apply the Johnson v. Zerbst standard to a waiver by consent of Fourth Amendment rights. *Cf.* Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973); Kaufman v. United States, 394 U.S. 217, 227 n. 8, 89 S.Ct. 1068, 22 L.E.2d 227 (1970).

II

The determination that defendants waived their rights to move to suppress on failure of minimization grounds is dispositive of these motions. Ordinarily it would render further discussion unnecessary. However, in view of the importance and relative novelty of the minimization question and the evolving law on the subject, I deemed it desirable that all aspects of the question should be explored. In order that the record should be full and complete, I held a post-trial evidentiary hearing as to what was done to carry out minimization. The evidence adduced at that hearing supplemented evidence on the same subject at the trial. The following are the relevant facts insofar as they are shown by the record:

Appendix B

The Holder Tap

The Holder tap was authorized by order of Judge Sullivan of the Westchester County Court dated September 27, 1971. The order recited that there were "reasonable grounds to believe" that conversations of Errol Holder and other persons over telephone number 914-969-4368 (listed to Carol Holder at 430 Warburton Avenue, Yonkers) would secure evidence of violations of the narcotics laws. The order authorized the interception, overhearing, and recording of "any and all" telephone conversations over the Holder telephone, "specifically those conversations of . . . Errol Holder, Jr., a/k/a 'The Fox', and unknown persons, showing conspirators [sic], concerning the purchase, possession, sale and source of supply and distribution outlets of dangerous drugs and the identity of other principals in this criminal activity. . . ." The interception began the following day and continued until November 24, 1971.[7] Interception was made at a "plant" near the Holder residence. The tape recorder automatically recorded all incoming and outgoing calls. There was also a "penregister" which recorded the telephone numbers of all outgoing calls. Westchester County law enforcement officers acting as monitors were present at the plant twelve to sixteen hours per day but the machines continued to operate automatically in their absence.

A log was kept of all calls, incoming as well as outgoing. Each call on a reel of tape was given a sequential number, and entries on the log noted the time of the call; whether it was incoming or outgoing, if the latter, the number called; and the names of the participants, if known or ascertainable from the conversation. Moreover, either a summary or rough transcript was prepared for each call. A notation "DNP" was made on the log if the call was "deemed not pertinent" by the monitoring officers.

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[7] An extension order was issued on October 29, 1971.

Appendix B

The logs were prepared as follows: after each reel was full, it was replaced on the recording machine by a fresh reel. The full reel was placed on a second machine and played back. As it was played back the log was prepared. Memoranda were also regularly prepared stating the number of calls deemed pertinent on each reel.

The monitoring officers testified they had been instructed to shut the tape recorder off if a "privileged" call was made. This was defined as a call to a doctor, lawyer, priest, or the like. No such calls were identified by the monitoring officers. The tape recorder was never turned off to preclude the interception of any call, in whole or in part.

The calls intercepted on the Holder tap can be broken down as follows (all figures are approximate):

Total calls	1900
Busy, wrong number, no answer	700
Information, time and weather	85
Actual Conversations Intercepted	1115
Number of calls noted as pertinent on memos	250
Number of calls marked DNP on logs	450

Logan Wiretap

The Logan tap was authorized by order of Justice Kapelman of the New York Supreme Court, Bronx County, dated November 8, 1971.[8] The order recited that there were "reasonable grounds to believe that evidence of violations" of the narcotics law would be obtained by intercepting conversations over the telephone listed under the name of Margaret Logan, which was "being used by one WILLIE ABRAHAM, a/k/a 'J.C.' . . ." It authorized the intercep-

[8] A renewal order was signed December 7, 1971 for an additional 30 days.

tion of "any and all" calls over that phone. The interception began that day and continued up until December 15, 1971, when Abraham, Logan and several other defendants were arrested. As on the Holder tap, the tape recorders automatically recorded all calls, although they could be shut off manually. The "plant" was manned around the clock, and a log was made of all calls. The notation NP was made on calls deemed by the monitors to be "not pertinent".

The officers manning the plant were New York City police who were instructed not to overhear privileged conversations, and a copy of the authorization order was posted at the plant. As with the Holder tap, the tape recorders were never shut off to avoid intercepting any call in whole or in part.

The calls overheard on the Logan tap can be broken down as follows:

Total calls	1025
Busy, wrong number, ring no answer	300
Information, time and weather	65
Actual Conversations Intercepted	660
Number of calls marked NP on logs	131

McBride Wiretap

The McBride wiretap was authorized by order of Justice Kapelman of the Supreme Court, Bronx County, dated November 8, 1971. The order recited that there were "reasonable grounds to believe" evidence of violations of New York narcotics laws would be obtained by intercepting conversations over 542-4514 "listed under the name of LAVERNE E. McBRIDE . . . and being used by the said LAVERNE E. McBRIDE. . . ." It authorized the interception of "any and all" conversations "which may be

reasonable for the purpose of obtaining evidence of the violation of the narcotics laws and conspiracy to commit the same. Interception continued from on or about that date until December 15, 1971. On November 17,1971, amendment of the initial order was sought and obtained based on previously overheard conversations relating to the shooting of one "Pedro", a frequent user of the McBride telephone. The amendment authorized the overhearing of conversations relating to assault by use of a weapon.[9] The plant was manned around the clock, and logs were made which either noted the call or summarized it. Privileged conversations, the monitoring New York City officers were instructed, were to be shut off. The machine was shut off only during one call.

Calls overheard on the McBride tap can be broken down as follows:

Total calls	680
Busy, wrong number, ring no answer	225
Information, time and weather	12
Actual Conversations Intercepted	443
Number of calls marked NP on logs	40

* * * * *

On all three taps, while each of the orders contained the statutory directions with respect to minimization, no specific instructions appear to have been given to the monitoring agents as to how minimization was to be affected. There is no evidence that any periodic reports were made to the courts issuing the wiretap orders or any supervision of the monitoring process by the court. Nor is there any evidence that the issuing court, during the course of the wiretaps, ever gave consideration as to how

[9] An extension order was signed December 7, 1971.

minimization could be effected in the light of what developed during the course of the interceptions.

With one exception all calls were intercepted and none were ever shut off. The calls intercepted included a substantial number of overheard conversations deemed not pertinent at the time by the monitoring officers—some 40% of the Holder conversations, 20% of the Logan conversations and 10% of the McBride conversations.

None of the 42 calls received in evidence at the trial is in this category. These calls were all highly pertinent to the investigation and of obvious evidentiary value from the beginning. Interception of these calls was fully authorized by the respective wiretap orders and fell squarely within their terms.

Among the calls, almost all of which were listed as DNP or NP, were some 26 calls over the Holder telephone to a doctor, hospital or dentist, some 6 of which were summarized in the logs, and frequent calls by Errol Holder placing or discussing policy bets; some 140 calls on the Logan telephone in which one of the participants was her 13-year-old daughter Tracy, about 50 of which were conversations between Tracy and her school mate, Tina, and some 20 calls on the McBride telephone to air-conditioning, furniture and credit companies, a hospital and her small child. No calls were turned off by the monitoring officers as privileged. A number of calls which might have fallen into the privileged category were monitored, though it does not appear that privileged matter actually came to light in any of them.

The Government takes the position that because of the nature and extent of the widespread narcotics conspiracy under investigation, it was, for all practical purposes, impossible to minimize the interceptions in this case since there was no discernable pattern of non-pertinent calls. Otherwise, the whole purpose of the investigation would be defeated.

Appendix B

At the post-trial hearing, the Government presented the testimony of Supervising Narcotics Agent Harris, who had analyzed the calls intercepted in terms of their investigative or evidentiary value from the standpoint of the case as a whole rather than on the contemporary judgment of the monitoring police officers. Harris testified that, on the basis of a fair sampling, approximately one-half of the calls lasted less than one minute. Quite plainly, such calls were not required to be shut off since there was not enough time to determine who the parties were or what was the subject of the conversation.

According to Harris, about one-half of the calls marked on the logs as DNP or NP turned out to be of investigative or evidentiary value, even though in the contemporary judgment of the monitoring police officers they were not pertinent. Though Harris seems to have used an overly expansive test of investigative value,[10] it is plain that certain calls so marked were pertinent. For example, one call pertained to picking up girls to operate the narcotics cutting mill; another concerned a girl seeking employment as a mill girl. Several of the calls in which the Logan daughter, Tracy, participated concerned messages from or for defendant Abraham which were pertinent to the investigation.

The Government points to the difficulties faced by the monitoring officers in determining which calls were pertinent and which were not. Among these considerations are the following: the conversations were conducted in the argel of the underworld, in guarded language and frequently in code; voices and names were difficult to identify; there were a large number of participants in varying roles in the criminal enterprise; the information as to the con-

[10] For example, any call made by a defendant at home was deemed by Harris to be of evidentiary value since it told the monitoring officers where that defendant was.

spiracy was constantly expanding, with new participants and new places where criminal activities were carried on frequently coming to light; it was necessary to make frequent checks with other phases of the investigation so that the surveillance activities simultaneously conducted could be effectively carried out; the whereabouts of the principals at any given time were important in themselves in terms of the context of the enterprise as a whole; lengthy calls, largely concerned with non-pertinent matters, particularly those of co-conspirators, were likely to include discussions of highly pertinent subjects; on the basis of hindsight, at least 90% of the calls furnished valuable and pertinent information; all of this contributed to the overall difficulties of determination by the monitoring officers of what calls were not interceptable.

There is little doubt in the light of these facts and the nature and extent of the criminal narcotics enterprise being carried on that the monitoring officers were faced with very great difficulties. Nevertheless, it cannot be said in this case that the minimization requirements were satisfactorily complied with.

[3] The test of whether or not the minimization requirements are complied with is not retrospective but contemporaneous. Though retrospective analysis of the pertinency of the calls intercepted may have some value, the monitoring officers must determine contemporaneously when to turn off the intercepting machine and stop listening so as to avoid conversations not authorized by the order. There were a substantial number of calls here which should have been shut off and not listened to and this was not done. Instead, such calls were overheard and often summarized on the log. Moreover, whatever the situation was at the outset of the interceptions, there was apparently no evaluation of the monitoring as it proceeded to determine which calls should be intercepted and which should

not. The interception continued to the end full blast, without the imposition of any restraints or instructions on that subject.

[4] It must be recognized that in authorizing interception for the purpose of obtaining information as to such a widespread narcotics conspiracy as this, some non-pertinent calls will necessarily be overheard. But the absence of any precautions to insure minimization here, the number of such calls intercepted and the lack of supervisory techniques impel the conclusion that the minimization requirements were not satisfactorily observed. I so find.

The basic question is whether or not the finding that the minimization requirements were not satisfactorily complied with entitles defendants to the relief which is the object of their present motions. That relief is directed at the suppression of the 42 intercepted telephone conversations admitted in evidence at the trial. The consequence of granting such relief would necessarily be that this evidence would be stricken from the record and the verdicts of conviction set aside.

As I have already pointed out, there can be no question that the interceptions of the 42 calls in evidence were fully authorized by the respective wiretap orders. The conversations intercepted were plainly pertinent to the investigation and of evidentiary value. On the instant motions the validity of the orders of authorization have already been decided by me and is not in question here.

[5] In my view, there is no basis for the suppression of the 42 calls validly and properly intercepted because minimization requirements as to other calls were not satisfactorily complied with. Such suppression is neither required by the provisions of 18 U.S.C. Chapter 119, under which the interceptions were made, nor by any other

principle of law, and would be contrary to established law and public policy.

In Chapter 119[11] Congress sought to strike a balance between the legitimate requirements of effective law enforcement and the constitutional right to privacy, guided by the then recent decisions of Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507,19 L.Ed.2d 576 (1967). It has since been held, a number of times, that Congress succeeded in so doing and that the statute is constitutional. *See, e.g.*, United States v. Tortorello, 480 F.2d 764 (2d Cir., 1973); United States v. Cox, 462 F.2d 1293 (8th Cir., 1972); Cox v. United States, 449 F.2d 679 (10th Cir., 1971); cert. denied, 406 U.S. 934, 92 S.Ct. 1783, 32 L.Ed.2d 136 (1972).

The scheme of the statute prohibits the interception of wire or oral communications except as specifically provided for in the Chapter. § 2511. Disclosure of information in violation of the Chapter is forbidden, § 2515, and the circumstances under which disclosure is permitted of information secured under authority of the Chapter is strictly regulated. § 2517. Criminal penalties and civil remedies for damages are provided for violations. §§ 2511, 2512, 2520. *See* United States v. Cox, *supra*, 462 F.2d at 1301-1302; United States v. LaGorga, 336 F Supp. 190, 196-197 (W.D. Pa. 1971).

The statute sets up numerous safeguards designed to protect against invasion of the right of privacy. An order authorizing interception can only be obtained from a judge of a court of competent jurisdiction by specified law enforcement officers. § 2516. It must be supported by a de-

[11] As has been pointed out, *supra* p. 738, the New York statute under which these communications were intercepted is for all practical purposes a counterpart of Chapter 119 and complies with its requirements.

tailed showing under oath that there is probable cause that one of the serious crimes specified in the statute (§ 2516) is being, has been, or is about to be, committed by a named individual or individuals; that an identified telephone is being used for these criminal purposes and that no other investigative technique is likely to succeed. § 2518(1).

There must be findings by the judge that there is probable cause to believe all this before such an order can be issued. § 2518(3). Time limitations are placed on the interception. § 2518(5). The order must contain minimization directions. *Id.* It may be noted that the minimization provision of the statute does not contemplate that no unauthorized calls will be intercepted. Indeed, the very use of the word "minimize" indicates that Congress recognized as a practical matter that some unauthorized calls might necessarily be intercepted but that these should be reduced, as far as possible, to a minimum.

Periodic reports can be required by the issuing judge. § 2518(6). Conversations should be recorded on tapes and the tapes must be sealed, subject only to proper usage under the supervision of the court. § 2518(8)(a). Within 90 days after termination of interception, notice must be given to the persons named in the order or application and to other persons overheard if the judge so directs. § 2518(d).

Any aggrived person may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom . § 2518(10)(a).

The report of the Senate Committee on the proposed statute states, "There is . . . no intention . . . generally to press the scope of the suppression role beyond present search and seizure law." S.Rep. No. 1097, 2 U.S.Code Cong. & Admin.News, pp. 2112, 2185 (1968).

[6] In the ordinary case the seizure of some items beyond those specified in a search warrant does not result in the suppression of those items which were validly seized.

See, e.g., Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1917) (as to the liquors); United States v. Dzialak, 441 F.2d 212 (2d Cir.) (as to all items seized except the watches), cert. denied, 404 U.S. 883, 92 S.Ct. 218, 30 L.Ed.2d 165 (1971); Brooks v. United States, 416 F.2d 1044, 1049-1050 (5th Cir. 1969), reh denied, 424 F.2d 554 (5th Cir. 1970), cert. denied, Nipp v. United States, 400 U.S. 840, 91 S.Ct. 81, 27 L.Ed.2d 75 (1970); United States ex rel. Nickens v. LaVallee, 391 F.2d 123 (2d Cir. 1968) (as to items seized from Nickens' living quarters other than the newspaper clippings); United States v. King, 335 F.Supp. 523, 544-545 (S.D.Cal.1971), rev'd on other grounds, 478 F.2d 494 (9th Cir. 1973); United States v. Leta, 332 F.Supp. 1357, 1360 (M.D.Pa.1971); United States v. Castle, 213 F.Supp. 52, 56, 60 (D.D.C. 1962), aff'd 120 U.S. App.D.C. 398, 347 F.2d 492 (1963), cert. denied, 381 U.S. 929, 953, 85 S.Ct. 1568, 14 L.Ed.2d 687 (1965). It was plainly the intent of Congress that the same rule should be applied in the case of wire communications intercepted under Chapter 119 and that, in my view, is what the statute provides.

United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972), so holds:

> Clearly Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations. The nonincriminating evidence could be suppressed pursuant to 18 U.S.C. § 2518(10)(a), but the conversations the warrant contemplated overhearing would be admitted.

United States v. King, *supra*, to the same effect as *Cox*, is a convincing exposition of the reasons why suppression of all calls should not be granted because of failure of mini-

mization. In *King,* the agents had been instructed that "every conversation was to be recorded, except those between an attorney and client concerning a pending criminal case. As to those conversations which were obviously irrelevant to the smuggling conspiracy, the agents were simply told there was no need to monitor them." 335 F.Supp. at 540-541. *See* also United States v. Mainello, 345 F.Supp. 863 (E.D.N.Y. 1972); United States v. La Gorga, *supra,* 336 F. Supp. at 195-197.

This is not a case where suppression could be called for because the communications admitted to the trial were tainted by conversations intercepted in violation of minimization requirements. Here there was no claim that the 42 conversations admitted in the trial and lawfully intercepted were tainted. These conversations stood on their own feet as relevant evidence of participation in and commission of the crimes charged.

Nor is this a case where a single conversation with one individual or a single transaction is the object of the wiretap. Here the investigation was concerned with a complicated and widespread criminal enterprise involving numerous transactions and many persons. As was pointed out in La Gorga, *supra,* at 196:

> [I]t is often impossible to determine that a particular telephone conversation would be irrelevant and harmless until it has been terminated. It is certainly not unusual for two individuals using the telephone to discuss social matters or items of general interest before getting to the precise point which is to be covered in the call. Similarly, when a call is made to a residence, the telephone is often answered by a young child who will turn it over to one of the adult members of the household at some point in the conversation. It is also rather common that a telephone conversation initially between two children will later develop into a discussion between adults.

* * * *

Appendix B

> It is all well and good to say, after the fact, that certain conversations were irrelevant and should have been terminated. However, monitoring agents are not gifted with prescience and cannot be expected to know in advance what direction the conversation will take. It is also true that, during the early part of the surveillance, it was necessary for the agents to familiarize themselves with the voices of those who were working with the defendants.

The only case holding that all calls, whether intercepted under the terms of the authorization order or not, should be suppressed because minimization requirements were not complied with is United States v. Scott, 331 F.Supp. 233 (D.D.C.1971) (appeal by Government pending).[12] It was there said that absent such a holding "the protections to the right of privacy outlined in *Berger* and *Katz* would be illusory." 331 F.Supp. at 248.

I do not find *Scott* persuasive and do not follow it. In my view, what *Scott* seeks to accomplish has already been accomplished by the statute itself with the safeguards Congress has provided. I see no reason why a different rule should be applied in the interceptions of telephone conversations under court order than is applied to items seized under search warrants issued by the court. To do so would be not only unnecessary for the protection of consti-

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[12] Some cases holding that minimization requirements of § 2518(5) were satisfied, and thus did not have to decide the remedy question, have cited *Scott* with apparent approval. United States v. Tortorello, 480 F.2d 764, 783, 784 (2d Cir., 1973) (which does not refer to Eighth Circuit opinion in United States v. Cox, *supra*); United States v. Lanza, 349 F. Supp. 929, 932 (M.D. Fla. 1972); United States v. Focarile, 340 F. Supp. 1033, 1044-1050 (D. Md. 1972), aff'd sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1972). *See also* United States v. Leta, 332 F. Supp. 1357, 1360 n. 4 (M.D. Pa. 1971) (dictum).

tutional rights but contrary to the public interest in legitimate and effective law enforcement.

I hold, therefore, that the defendants are not entitled to suppress all conversations intercepted pursuant to the wiretap orders in this case, including the 21 intercepted conversations admitted in evidence.

The defendants' motions to suppress are denied in all respects, both on the ground that defendants waived their rights to make such motions and on the merits.

It is so ordered.

APPENDIX C

Relevant Provisions of Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520

§ 2511. Interception and disclosure of wire or oral communications prohibited.

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other

commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communications, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common

carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception uniess such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of

the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

* * * * *

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516, Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or

approving the interception of wire or oral communications by the Federal Bureau of Investigation or a Federal agency having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (not legible)

(b) a violation of section 186 of section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations) or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information) section 1503 (influencing or injuring a officer juror or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and

welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and

punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

* * * * *

§ 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the activity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about

to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to

whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

> (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any

wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was

not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order

granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

* * * * *

§ 2520. Recovery of civil damages authorized.

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

APPENDIX D

§ 848. Continuing criminal enterprise—Penalties; forfeitures

(a) (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

Jurisdiction of courts

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper. Pub.L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265.

APPENDIX E

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E-1

LEGISLATIVE HISTORY

P.L. 91-513

ADDITIONAL VIEWS

The main report of this committee accurately states that drug abuse in the United States is a problem of most serious concern. We feel that it is serious and complex enough to deserve precise congressional treatment, not the quick, rimfire legislative reflex action often set off by dramatic events and emotional responses. Initially, the evil involved here deserves accurate description. It is not "drug abuse"; it is abuse of people by misuse of drugs, and it is important that we not further abuse people by misuse of law and process in attempting to bring about reform.

It must be said, though, in behalf of the committee that its majority was not impervious to constitutional criticism and to suggestions going toward due—and fair—process. All of the presumptions of guilt contained in the language submitted by the Justice Department which appeared in the original bill have been omitted upon the suggestions offered by the signers of these additional views. It must be said, too, that the subcommittee and the full committee worked diligently to present a framework upon which to build solid legislation for control of narcotics, psychedelics, amphetamines, barbiturates, and tranquilizers in a single piece of legislation. We join in this endeavor, and each of us joined in the unanimous vote to bring this matter to the floor of the House.

Nevertheless, serious defects remain in the legislation as reported: defects which may cause unnecessary and unjust pain particularly to young people and their anxious parents, defects which may unnecessarily place serious constitutional impediments in the way of immediate enforce-

ment, and defects which go against the grain of Anglo-American concepts of due process.

Since other provisions of the bill are in general wholesome we will pass at once to these defects. They fall in these categories:

I. Those provisions pertaining to the continuing criminal activity section, and

II. Those provisions pertaining to the no-knock section.

Let us consider them in order:

I. THE CONTINUING CRIMINAL ACTIVITY PROVISION

A. *Origin of Continuing Criminal Enterprise Provision*

Three variations of the "continuing criminal activity" concept appear in versions of legislation before Congress. The concept is contained in S. 30, relating to the control of organized crime, in a section called "Dangerous Special Offender Sentencing." The provision of that section most comparable to the provisions in this bill appears in the language of title X, section 1001 of S. 30. It would provide a new section in chapter 227, Title 18, United States Code, Section 3575. Subsection (e) of that title would provide in part:

> (e) A defendant is a special offender for purposes of this section if—
>
> * * * * *
>
> (2) The defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise;
> * * *

Appendix E-1

This provision in the organized crime legislation deals with sentencing, as does the language of H.R. 18583 as originally introduced.

B. *Continuing Criminal Enterprise Provisions of This Bill*

The language in H.R. 18583 is somewhat different but is essentially to the same effect. It is, as it appears in its final form in the bill, as follows:

> (b) For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if——
>
> (1) he violates any provision of this title or title III the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this title or title III——
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

C. *Common Provisions of Both Bills*

In both these bills, S. 30 and H.R. 18583 in its original form, the prosecuting attorney is called upon, in order to institute the special sentencing procedures, to file with the court an instrument specifying that the defendant falls in the category of a special offender, in which case special procedures are provided for sentencing.

Appendix E-1

Both bills provide for a hearing before sentencing wherein the defendant is permitted the ordinary representation and process, except that he is to be afforded only "the substance of such parts of the presentence report as the court intends to rely upon" and this only if there are not "placed in the record compelling reasons for withholding particular information."

D. *Original Continuing Criminal Enterprise Provisions*

Though the original provisions of the continuing criminal enterprise section are not contained in the bill as finally reported (the language quoted above *is* in the bill), it is important to discuss them for three reasons:

(1) They show the history, development, and rationale of the special offender concept which originated with the Justice Department;

(2) Some of the criticisms relating to them are also applicable to the amended provision in the reported bill; and

LEGISLATIVE HISTORY

P.L. 91-513

(3) There is substantial Justice Department sentiment to retain the language of the original bill, and members may be called upon to choose between the original language and the amended language.

Let us comment briefly on these three points:

First, there can be no doubt that the Justice Department in S. 30 and in H.R. 18583 and its precursors has shown little sensitivity either toward constitutional rights or toward modern concepts of penology and rehabilitation. Whatever bill is passed may be expected to be enforced by

a department affected by those predilections reflected in its original recommendations. Therefore, it is necessary for Congress to speak clearly and unambiguously in opposition to peremptory sentencing practices if such are to be avoided.

Second, since some of the provisions are also applicable to the amended provision in the reported bill, testimony by the American Bar Association and the Association of the Bar of the City of New York on S. 30 are applicable to the reported bill.

Third, if an amendment is offered in behalf of the administration, it is important for members to know that the Dingell Amendment—though far from perfect—cures serious additional constitutional defects contained in the original bill. These are discussed below.

E. *Objections to Original Provisions*

The serious objections to the original language of H.R. 18583 which were eliminated by the Dingell amendment are as follows:

(1) Under the original language the court would have before him, in addition to the indictment, a statement that the defendant is a person who has been involved in a continuing criminal enterprise, which statement could contain material which neither the defendant nor his counsel would ever see. The court would have the entire presentence report before him and would determine what parts of such report he intends expressly to rely upon. Only these would be given to the defendant or his attorney and this would only be done at the time of the sentencing hearing. Furthermore, even this would not be available to the defendant or his attorney if the court found "compelling reasons for withholding particular information."

(2) "Information" of all kinds, not only hearsay and rumor but also, presumably, the fruits of unlawful searches or illegal wiretapping, could be used and the defendant sentenced to life without any of the real protections afforded by a jury trial. (See report of the Association of the Bar of the City of New York, on S 30, p. 92.)

(3) The right to cross-examination is an illusory one because, even if the probation officer who prepared the presentence report should be present at the hearing, cross-examination of him would be no substitute for cross-examination of the various people who provided the information in the presentence report. (See ibid, p. 93; "General Criticism of Title X" in the association's report further enlarges the points made here, pp. 89-94.)

(4) Under the original provisions of H.R. 18583 respecting one of the elements of a continuing criminal offense (that defendant had derived substantial "income or resources" from the enterprise) the burden of proof would be on the defendant to show that *any* substantial income or resources in his name or under his control were not derived from lawful activities or interests. The Dingell amendment eliminated this provision which held the defendant guilty of this element of the offense unless he proved himself innocent.

Even the proponents of this special sentencing procedure had constitutional doubts about it. The Justice Department conceded: "The lack of direct precedent makes it virtually impossible to predict whether these procedures would survive constitutional challenges." Senate Hearings on S. 30, page 377. The report on the proposed Organized Crime Control Act of 1969 (S. 30) by the Association of the Bar of the City of New York says: "We think that it is unlikely that the proposed procedures would pass constitutional muster" (see p. 91).

Appendix E-1

F. *The Dingell Amendment*

The amendment offered by Mr. Dingell which was adopted by the full committee corrected these defects. Instead of providing a postconviction-presentencing procedure, it made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court.

Thus, it is seen that the Dingell amendment improved the continuing criminal activity section. All of the signers of these additional views supported the Dingell amendment as preferable to the original language. However, candor requires that it be pointed out that this section still contains serious objections, objections which also apply to the original provisions in the continuing criminal offense portion of the bill. They are as follows:

(1) The definition of what is a continuing offense is indefinite in that—

> (*a*) *It is not at all clear what constitutes a "continuing series of violations of this title or title III* * * *."

Suppose, for instance, that six young men attending a college reside together in a cooperative boarding house. All of them have engaged in the practice of smoking marihuana cigarettes and there has been, on a day or more, free exchange between them of such forbidden drug. Each incident of giving a cigarette to another constitutes a felony. How long must this practice continue in order to constitute a "continuing series of violations"? Would a single day's experiment with smoking "pot" constitute a "continuing series of violations," or would it require a week, a month, or a year of such activities to make the offenses "continuing"?

> (*b*) *It is not at all clear what is meant by deriving "substantial income or resources" from the enterprise.*

Appendix E-1

Let us take the situation mentioned above. Suppose one of the young men is the house manager of the boarding house. As such he is in a general "supervisory position" or "other position of management" in the ordinary affairs of the house, but he has not ordinarily obtained any "income or resources" connected with the sale of marihuana. He has only been paid for his general house management. On one occasion he purchases $100 worth of marihuana and divides it with the other five members, selling it to them at cost. Has he then obtained "substantial income or resources" in connection with the enterprise?

Or what if such common purchase by one of the group is done each week? Also, does "substantial income or resources" relate to profits or, on the other hand, to mere receipt of money? Would "income or resources" include the advantage to the house manager of obtaining his own share of the marijuana at a cheaper rate because it was bought in bulk?

(2) The very severe penalty of the continuing criminal enterprise section (a minimum of ten years and a maximum of life imprisonment) is applicable to a broad range of criminal activities, some of which are very mild and some of which are very serious, without discrimination.

The American Bar Association in its "Standards Relating to Sentencing Alternatives and Procedures," approved August 1968, stated that the sentence imposed in special offender cases should not be disproportionately more severe than a maximum sentence generally provided by law for a given felony. Edward L. Wright, president of the American Bar Association, objected to the language of the special offender sentencing provisions of S. 30 because they violate such standard. (See his testimony before Subcommittee No. 5 of the House Judiciary Committee on July 23, 1970.)

The standard is even more flagrantly abused in the bill recommended by this committee. The student house manager described in the example above would have to receive

at least a 10-year sentence if convicted at all. The same sentence might be received by a member of a ring of heroin peddlers operating wholly for profit. Indeed, it is conceivable in cases where long-haired students are particularly obnoxious that the student house manager—who is, say, also a black activist—would receive a life sentence. In another community a hard-working "straight" heroin peddler, with a large family and a good lawyer, might receive the 10-year sentence.

The point is that the range of penalty, running as it does up to the life sentence, is too wide to encompass offenses which range from hardly more than student peccadillos to hardened crime. The duty of the legislative body to bracket offenses and penalties is solely for the purpose of creating uniformity and fairness as between different judges, different juries, and different parts of the country in the application of the criminal law intended to be enforced fairly and uniformly.

Since there is no field of criminal law which is more subject to abuse—subject as it is to planting evidence, framing the accused or stirring up the prejudice of the community—than that involving drug abuse, it is extremely important that we not leave the range of risk and punishment to prosecutor's discretion. Unfortunately, prosecutor's discretion is sometimes like the discretion of the hound on the scent of the hare. It is our duty reasonably to constrain it.

(3) The mandating of a minimum penalty upon the Court presents the dilemma of—

> (*a*) Holding a person guilty of a minor or moderate crime not guilty in order to avoid the inordinate sentence of 10 years, or
>
> (*b*) Imposing a 10-year sentence upon one who is not guilty of a serious crime, not likely to be a repeater, and whose life may be ruined by the conviction.